

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6013

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Dkt. No. 77-6013

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
the UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

v.

WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION
LOCAL UNION NO. 46, THE JOINT APPRENTICESHIP
COMMITTEE OF THE EMPLOYING METALLIC FURRING AND
LATHING ASSOCIATION OF NEW YORK AND LOCAL NO. 46 of
the WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION,

Defendants-Appellees,

DAVID LLOYD FOREMAN,

Movant-Appellant.

JOINT APPENDIX

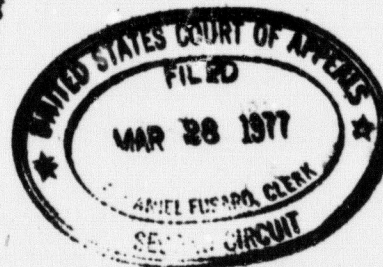
Gerald J. Dunbar, Esq.
9th Floor
38 Park Row
New York, New York 10038
(212) 566-4889

Walter Colleran, Esq.
Doran, Colleran, O'Hara
Pollio & Dunne
1140 Avenue of the Americas
New York, New York 10036
(212) 986-3737

David A. Raff, Esq.
Employment Law Clinical Program
of Washington Square Legal
Services, Inc.
Suite 220
49-51 Chambers Street
New York, New York 10007
(212) 566-1327

Counsel for Defendant-Appellees

Attorneys for Movant-Appellant



PAGINATION AS IN ORIGINAL COPY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Dkt. No. 77-6013

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
the UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

v.

WOOD, WIRE AND METAL LATHERS INTERNATIONAL UNION
LOCAL UNION NO. 46, THE JOINT APPRENTICESHIP
COMMITTEE OF THE EMPLOYING METALLIC FURRING AND
LATHING ASSOCIATION OF NEW YORK AND LOCAL NO. 46
of the WOOD, WIRE AND METAL LATHERS INTERNATIONAL
UNION,

Defendants-Appellees,

DAVID LLOYD FOREMAN,

Movant-Appellant.

JOINT APPENDIX

Gerald J. Dunbar, Esq.
9th Floor
38 Park Row
New York, New York 10038
(212) 566-4889

David A. Raff, Esq.
Employment Law Clinical Program
of Washington Square Legal
Services, Inc.
Suite 220
49-51 Chambers Street
New York, New York 10007
(212) 566-1327

Attorneys for Movant-Appellant

Walter Colleran, Esq.
Doran, Colleran, O'Hara,
Pollio & Dunne
1140 Avenue of the Americas
New York, New York 10036
(212) 986-3737

Counsel for Defendant-Appellees

TABLE OF CONTENTS

	Page
1. Hearing Record dated May 5, 1975, before GEORGE MOSKOWITZ, Esq.....	3
2. Memorandum dated May 28, 1975, addressed to the Administrator by counsel for Mr. Foreman.....	73
3. Decision of the Administrator, dated September 25, 1975....	77
4. Motion for Reconsideration, dated October 27, 1975, filed by counsel for Mr. Foreman with the Administrator....	83
5. Decision of the Administrator on the Motion for Reconsideration, dated January 20, 1976.....	96
6. Record of Hearing before GEORGE MOSKOWITZ, Esq. with exhibit.....	104
7. Decision of the Administrator, dated September 27, 1976....	132
8. Decision of the Administrator, dated August 2, 1976.....	136
9. Motion for Reconsideration, dated October 8, 1975, filed by Counsel for Local 46 with the Administrator.....	195

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ADMINISTRATIVE HEARING

-----X
:
In the Matter
:
of
:
METAL LATHERS UNION, LOCAL 46.
:
Re: David Lloyd Foreman.
:
-----X

New York Sheraton Hotel
New York, New York

May 5, 1975
12:15 o'clock p.m.

B E F O R E:

GEORGE MOSKOWITZ,

Administrator

1
2 A P P E A R A N C E S :

3
4 For the Union:

5 WALTER M. COLLERAN, ESQ.
6 1140 Avenue of the Americas
7 New York, New York 10036

8 For David Lloyd Foreman:

9 GERALD J. DUNBAR, ESQ.
10 49-51 Chambers Street, Suite 220
11 New York, New York 10007

12 JERRY L. SIEGEL, ESQ.
13 United States Attorney's Office
14 1 St. Andrews Place
15 New York, New York 10007

16 DAVID RAFF, ESQ.

17 oOo

P R O C E E D I N G S

THE ADMINISTRATOR: Gentlemen, let us proceed.

Just let me state that Mr. David Foreman, who is a permit-holder, I believe, at the Local 46 hiring hall, has made a complaint in various forms and various places, the sum and substance of which is that he was summarily laid off from his employment at the Hudson River and 135th Street where he was employed by the Perrini Associates as the contractor.

Mr. Foreman, at least to my knowledge, originally filed charges with the New York State Human Rights Commission, which was subsequently withdrawn. He has advised my office through Mr. Dunbar.

You may recollect, gentlemen, that we held a meeting in my office on March 14, 1975. At that meeting Mr. Dunbar requested an opportunity to continue the investigation and specifically to make inquiry of the foremen at the job site. Thereafter, Mr. Dunbar asked the Administrator to hold a hearing since his investigation differed from the explanations given at the informal meeting on March 14th with

1
2 respect to the reason or reasons, if any, for Mr.
3 Foreman's layoff.

4 Gentlemen, I would like to proceed as in-
5 formally as possible, although I know that this
6 must be conducted in the sense of an adversary
7 proceeding, but informally and to avoid wherever
8 possible technical objections to testimony. I
9 think you will have to assume that I, as the Admin-
10 istrator, will understand the difference between
11 hearsay and statements or testimony that have some
12 probative value.

13 If you have any other suggestions or comments
14 which you would like to make with respect to whatever
15 the rules of this procedure ought to be, I am open
16 to your suggestions.

17 MR. COLLERAN: I would like to make one ob-
18 servation for the record. It's simply that the
19 letter that you sent to the Union setting down this
20 hearing says in the last paragraph, "I direct the
21 Union to require the presence of foreman John Linner
22 and any other supervisors who may have had the re-
23 sponsibility for issuing the layoff orders."

24 I really don't know why it should be the
25 Union's responsibility to bring supervisors down.

1
2 It seems to me that that would be the employer's
3 responsibility to have supervisors present. In
4 connection with that, I would like to ask the
5 Administrator if he ever notified the employer that
6 there was going to be a hearing and requested his
7 presence at the hearing or a representative of the
8 employer; because I believe that in any of these
9 cases where people talk about the possibility of
10 seeking reinstatement with back pay, the back pay,
11 per force, must be paid by the employer.

12 We don't pay back pay. The Union doesn't
13 fire anybody. The Union sends people out to the
14 jobs and the employer's representatives judge
15 whether or not the man should stay on the job.

16 So when the Administrator says, "I direct
17 the Union to bring the supervisors down," I must
18 object to that procedure. I think if the Admini-
19 strator wants representatives of the employer here --
20 and I think they should have them here -- I think
21 it is incumbent upon him to notify the employer.

22 But it puts the Union in the awkward position
23 of asking members to come down who are members, of
24 course, but who on the job represent the employer.
25 It's as if the burden is on the Union to substantiate

1
2 the basis for the discharge or whatever the reason
3 was for terminating the services of the employee
4 who is making the complaint. I just don't think
5 the burden should be on us. I think it's the
6 employer's responsibility and that is where the onus
7 should be, not on the Union.

8 I want to say this at the outset to at least
9 clarify the Union's position.

10 THE ADMINISTRATOR: I think you make a good
11 point, Mr. Colleran.

12 The last paragraph of my letter was included
13 there probably for two reasons, although at the
14 time I only thought of one. That was that the foreman,
15 as a member of Local 46, is subject to some response
16 at the Union's call. I know also, as well as every-
17 body else does in this room, that on many jobs the
18 foreman is designated as foreman because he's the
19 first one to be sent out on the job. So he comes
20 out of the hiring hall and five minutes before
21 he's sent out he doesn't know whether he is going
22 to be the foreman on the job or whether he is just
23 going to be a journeyman.

24 Moreover, as you well know, employers are not
25 parties to the stipulation of settlement. It's

1
2 doubtful whether the Administrator has any juris-
3 diction to compel the employer to appear or to send
4 his representatives.

5 The last paragraph merely reflects, in my
6 judgment, the fact that the foreman, as a member
7 of Local 46, is subject to some responsibility to
8 the Local. Furthermore, in essence -- and I am
9 saying this in general terms -- the inquiry by the
10 Administrator must be framed in terms of the
11 responsibilities of the Union. If the Union has,
12 through its members or through its foreman, as a
13 member of the Union, not engaged in some discrimin-
14 atory activity, I don't know that the Administrator's
15 powers extend to making some determination with
16 respect to action of the employer, and the Union's
17 hands are clean in the matter; unless the U.S.
18 Attorney's Office reads the settlement and court
19 decree differently.

20 MR. SIEGEL: We, of course, agree that the
21 employer is not a party to the settlement agreement.
22 The instance in which the Union is party to and
23 in our view liable for damages, whether they be
24 termed back pay or what, arises where the Union
25 official, whether he be a foreman or whatever, is,

in fact

in fact, responsible for the decision as to who is to be laid off and who is not. It is not the Union's responsibility where the employer says discharge ten men and ten men are discharged. The responsibility on the part of the Union arises by virtue of the fact that it is the foreman or whichever official it is who actually determines which individuals are to be laid off.

Where there has been an allegation of a breach of the hiring rules, the Union is then a party and the Union is liable for damages, monetary or otherwise, however you want to term them.

THE ADMINISTRATOR: You said the Union is liable?

MR. SIEGEL: Right.

So there is no question where the employer is a party where the allegation is that people have been laid off and there is something wrongful in the mere discharge. But where the Union is responsible for determining which individuals are laid off and in what order that is to occur, there is no question in the view of the Government that the Union is liable.

I read your letter, frankly, Mr. Moskowitz,

1
2 just to indicate that insofar as there were persons
3 beyond the foreman who were responsible for the
4 discharge in this case, they were to be here as
5 witnesses. And it seemed perfectly clear to me
6 in that respect.

7 MR. COLLERAN: I couldn't disagree more with
8 Mr. Siegel's statement that we should be held liable
9 for layoffs unless there is no active participation
10 taken by Union officials.

11 MR. SIEGEL: That is just what I said.

12 MR. COLLERAN: The foreman is not acting in
13 that capacity when he is acting as foreman.

14 MR. SIEGEL: Where the foreman makes the
15 decision as to which individual is to be laid off,
16 once he is given the order that somebody is, in
17 fact, to be laid off.

18 The point is that the violation occurs when
19 there is an error in the order in which people
20 are laid off, and it's that decision that is made
21 by the Union official, not the employer.

22 MR. COLLERAN: I would like to read something
23 into the record which might help a little bit in
24 this respect.

25 On July 12, 1971 a hearing was held before

1
2 Judge Frankel at which the employer representatives
3 requested to be heard in respect to the rules that
4 were then being formulated.

5 You may recall that occasion, Mr. Moskowitz.

6 In the course of the presentation to Judge
7 Frankel, on page 34 of that record, the Judge says,
8 "By the way, I have a small legal problem, Mr.
9 Harris" -- who was then the U.S. Attorney handling
10 the case -- "To what extent do we all contemplate
11 that the employers are bound by these rules all
12 together?"

13 Mr. Harris says, " Well, Your Honor, I think
14 this problem has bothered Mr. Silberberg and myself
15 in this proceeding. But the record of the con-
16 tempt proceeding here reveals that the foremen
17 are admittedly the employer's representatives.
18 But it is they who really exercise the power to hire
19 and fire on these jobs. The foremen wear two hats.
20 And in their Union hat they are subject to the
21 rules."

22 Later, down at the bottom of the page, he says,
23 "We think where there was discrimination in lay-
24 offs, we think probably the foremen can be bound
25 by these rules and the employer along with them."

1
2 That was the Government's position at that
3 particular time.

4 THE ADMINISTRATOR: Does that differ from what
5 Mr. Siegel is saying now?

6 MR. SIEGEL: Yes, exactly.

7 MR. COLLERAN: It is exactly the same?

8 MR. SIEGEL: I see them as exactly the same.

9 MR. COLLFRAN: You think the employer could be
10 held liable?

11 MR. SIEGEL: Yes. But that's totally
12 irrelevant.

13 The only question is whether the Union is,
14 in fact, liable for violations of the hiring hall
15 rules. And as to that, I don't see any question that
16 he is. That is really the only question that has
17 to be answered.

18 THE ADMINISTRATOR: At this point, Mr. Col-
19 leran and Mr. Siegel, I think it would be useless
20 to conjecture under what circumstances action taken
21 by the foreman could be established as being action
22 exclusively as a representative of the employer with
23 no attributable responsibility to the Union.

24 It seems to me that one might also, by con-
25 jecture, hypothesize some situations where the foreman,

1
2 acting on his own or acting within the scope of his
3 authority or perhaps under the color of his
4 authority as an employer representative, is, in
5 fact, chargeable with acting in a way which is in
6 support of the Union and the Union responsible for
7 his acts, despite the fact that he is at the time
8 wearing his foreman's hat.

9 I think each of us could furnish hypothetical
10 illustrations, but I think this is neither the time
11 nor would it serve any purpose to engage in such
12 imaginative situations.

13 I think what is involved in the situation
14 before us, and is probably the most common kind of
15 complaint that employees make when they are laid
16 off, is that they were selected for layoff by the
17 foreman not because he received a specific direction
18 from his employer to lay off a specific employee;
19 but that his selection of the employee is only
20 explainable on the basis of some discriminatory
21 judgment which has a discriminatory bias.

22 It is a rather narrow area of examination,
23 I suspect, but I don't know that my authority is,
24 in these cases, much broader. I am willing to
25 accept a broader authority if it can be reassured

1
2 to me that I possess it.

3 MR. RAFF: I would like to make a comment
4 that might possibly expand somewhat upon the
5 foundation for your authority.

6 Part of the question here, in addition to what
7 you have just commented upon, is did the Union
8 act within the spirit and the letter of the con-
9 sent decree in its investigation to determine whether
10 or not Mr. Foreman was laid off for cause, since
11 the consent decree holds that layoffs shall be in
12 proper order except where cause is shown; did the
13 Union act responsibly in determining whether or not
14 such layoff was, in fact, for cause or was pretext-
15 ual; if the Union acted in an arbitrary or capricious
16 manner in that investigation or did a cursory in-
17 vestigation, did they live up to the true meaning
18 of the consent decree when it talked about layoff
19 for cause.

20 If they did not properly investigate, then I
21 think damages certainly flow from their failure to
22 properly assist Mr. Foreman where he had not been
23 laid off under the proper sequence.

24 MR. COLLERAN: That raises another question.
25 That raises an active role on the part of the Union

1
2 that Mr. Raff is talking about.

3 But I have made my point and I think it is
4 important for the Administrator to know what the
5 parties' respective positions are on these matters.

6 THE ADMINISTRATOR: Mr. Colleran, I am sens-
7 itive to the parameters of my authority. I am also
8 sensitive to the number of communications I get
9 from men who are laid off and who, on the one hand,
10 get no satisfactory explanation from the foreman
11 at the time of layoff and then appear to be getting
12 no satisfactory explanation when they go to the
13 hiring hall.

14 It is not for me to say whether they are or
15 are not until such time as we have a matter such
16 as the one before us today.

17 I think we ought to proceed, if it's possible
18 to proceed here. I don't know how seriously you
19 want to urge the presence of the employer. I don't
20 know whether the employer is --

21 MR. COLLERAN: The fact is that there are
22 representatives of the employer here.

23 But my point was directed to your directing
24 us to do certain things in connection with the
25 supervisors and our role in this whole affair.

1
2 That was the point that had me disturbed when I
3 read your letter.

4 THE ADMINISTRATOR: Let me underscore as
5 succinctly as I can the meaning or the intent of
6 that paragraph in my letter to which everybody
7 seems to be referring.

8 It was intended to reflect the fact that it
9 is the Union which has certain responsibilities
10 under the stipulation of settlement with respect
11 to layoff of employees from a job. To the extent
12 that the Union has either complied with or failed to
13 comply with that provision, Paragraph 7 would, I
14 think, largely determine what the Administrator
15 regards as the rights of the permit-holder, the
16 laid off permit-holder, and the responsibilities
17 of the Union.

18 However, I should be guided in the future,
19 if there is any necessity in the future to hold
20 any further or similar meetings with respect to
21 complaints, to encourage the attendance of an employer
22 by invitation to the employer when and if such
23 occasion should arise.

24 Off the record.

25 (Discussion off the record.)

1
2 THE ADMINISTRATOR: Having said that, I am
3 open to suggestions, gentlemen, on how you want
4 to proceed.

5 Shall we have Mr. Foreman or his counsel
6 lay out what they regard as the basis for his com-
7 plaint?

8 MR. COLLERAN: He has the grievance.

9 MR. DUNBAR: The basis of Mr. Foreman's
10 complaint is quite simple. He was employed by
11 Perrini North River and was laid off not in con-
12 formity with the consent decree. He was not the
13 last one hired at the time of his layoff, and so
14 far there has been no showing of anything that could
15 rise to the level of just cause for discharge, since
16 that's the only other ground for layoff.

17 The second important facet of the case is
18 that Mr. Foreman attempted to secure the services
19 of his Union on his behalf. He went to speak to
20 Mr. McGovern who, in fact, ratified the action of
21 the employer's representative and refused to assist
22 him in getting his job back. He told him that the
23 layoff was, in fact, justified.

24 For this purpose we would like to just have
25 Mr. Foreman tell us what happened.

1
2 D A V I D L L O Y D F O R E M A N , called as a
3 witness on his own behalf, testified as follows:

4 THE ADMINISTRATOR: Would you give us your
5 full name, Mr. Foreman?

6 THE WITNESS: David Lloyd Foreman.

7 DIRECT EXAMINATION

8 BY MR. DUNBAR:

9 Q Mr. Foreman, are you a permit-holder in
10 Local 46?

11 A Yes.

12 Q When did you get your permit?

13 A I got my permit in 1972.

14 Q When were you sent out to this particular
15 job at Perrini North River?

16 A I was sent there in April 1974.

17 THE ADMINISTRATOR: Speak a little louder.

18 A I was sent in April 1974 from the Union hall
19 by Mr. Pete McGovern. When I went on the job --

20 Q How long did you work there?

21 A I worked for 7 months, 7 to 8 months.

22 Q While you were on the job did anyone ever warn
23 you that your productivity was not up to par?

24 A No. Not that I can remember.

25 Q Did anybody ever warn you about anything else

1
2 that may have been deficient in your work?

3 A No.

4 Q In December, when you were laid off, were you
5 ever given any indication as to why you were laid off?

6 A No. No one notified me or anything concerning
7 that.

8 Q Did you, in fact, approach the foreman and
9 ask him -- the deputy foreman, excuse me.

10 A No. I approached the shop steward.

11 Q Who is that; Mr. Murray?

12 A Yes.

13 Q What did Mr. Murray say to you?

14 A He said that he couldn't really tell me the
15 reason why I was being dismissed; but all that he knew
16 was that they were going to lay off some white workers
17 later on.

18 Q Did you believe that your discharge was
19 unfair?

20 A Yes. And I told him that if I didn't know the
21 reason why I was being dismissed, I would not accept the
22 dismissal.

23 Q Who was the first person to tell you you were
24 dismissed?

25 A My co-worker Johnson.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q How did he hear it?

A He said he went to the foreman and asked the foreman for some time off for the day. And the foreman said that he should not leave that day because he was going to be laid off, he and Foreman.

Q Which foreman was this who told you?

A John Linner.

Q Isn't it also a fact that Mr. Johnson is black?

A Yes. He's a black man.

Q How long had he been on the job?

A Both of us went on the job at the same time.

Q In other words, he had been on it seven months also?

A Yes.

Q Was any reason given for his layoff?

A He said he went to Mr. John Kruckel, the foreman, and pointed it out to him. And Mr. Kruckel told him that he knew nothing about his layoff.

I didn't went to Mr. Kruckel; Johnson did.

Q In other words, between the two of you, you spoke to Mr. Kruckel, the general foreman, Mr. Linner, the deputy foreman, and Mr. Murray, the shop steward?

A No. They gave me no reason.

Q Did you then go to the Union and try and

1
2 rectify the situation?

3 A Yes. I went to the Union the following
4 Monday morning and spoke with Mr. Pete McGovern.

5 Q Tell me what happened then.

6 A After I spoke with him he told me to wait
7 outside and he would investigate the matter.

8 Q In other words, when you say you spoke to Mr.
9 McGovern, you told him what had happened?

10 A Yes.

11 Q That you had been laid off?

12 A Laid off, and there was no reason.

13 Q Then what happened?

14 A He said that I should wait outside and he
15 would investigate the matter.

16 I went outside the office and I sat down for
17 a period of time, about thirty-five minutes. And Pete
18 McGovern came outside and told me that they have informed
19 him that I was going around on the job telling all the
20 workers that they shouldn't work because this job is a
21 big job.

22 Q They shouldn't work at all or they should
23 slow down?

24 A They shouldn't work at all, was a big job.
25 I denied this in front of Mr. Pete McGovern.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q What did Mr. McGovern say when you denied it?

A He said to me, "Well, they have told me that.
That's what they have told me."

Q Did he have anything else to say to you?
Did he just shrug his shoulders?

MR. COLLERAN: I object to leading the witness.
Let him tell what happened.

THE ADMINISTRATOR: Yes.

A I stood there for another thirty-five minutes
and no one said anything else to me.

Q And you left?

A And I left.

Q Did the Union ever get in touch with you
afterwards about your problem?

A No.

MR. DUNBAR: Thank you.

CROSS EXAMINATION

BY MR. COLLERAN:

Q What was the particular group of people you
were working with, Mr. Foreman?

A I was working in the cofferdam where Mr.
John Linner was foreman.

Q The cofferdam gang?

A Yes.

1

2

Q How many people were in that gang?

3

A It was three blacks.

4

Q I didn't ask you how many blacks. I said
5 how many people were there. Whites are people.

6

A When I just went in the gang there was four
7 whites and three blacks, seven in all. Me and Johnson
8 made seven.

9

Q Is it your testimony that --

10

(The Witness and Mr. Dunbar confer
11 off the record.)

11

12

Q Is it your testimony that at no time during
13 the seven months that you worked there you ever received
14 a complaint about your work?

15

A No. I received no complaints.

16

Q Do you know what a complaint is?

17

A Yes. I know what a complaint is.

18

Q Did the foreman ever tell you, "Foreman, you're
19 not doing your job"?

20

A No. He never said that.

21

Q Did he ever tell you "If you don't work a
22 little better you are going to be laid off"?

23

A No. He didn't tell me that.

24

Q Never?

25

A Never.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q Do you remember an occasion when you worked with Mr. Peters?

A No. Not by name. If he's here, maybe I could say yes, if I know him.

THE ADMINISTRATOR: A little louder, please.

MR. COLLERAN: Mr. Peters, could you stand up?

(Mr. Peters stands.)

Q Do you know Mr. Peters?

A Yes.

Q Did you ever work with him?

A Occasionally. If there's a big piece of work to be done.

Q Did he ever have any burning work for you to do and he asked you to hold the rods while he burned them at the bottom? Do you remember that occasion?

A No. Not that I can remember. I only do what the foremen tell me to do.

Q You don't do what anybody else tells you to do?

A The foreman.

Q If a foreman told you to go over to Mr. Peters and burn the steel, do you remember that?

A I don't remember that.

Q That you refused to hold the bars while Mr. Peters burned them; do you remember that?

1 A No. I don't remember that.

2 Q Here you ever told that you were standing
3 too close to your friend Johnson when you were lifting
4 up the heavy rods?
5

6 A Well, it's only me and Johnson really worked
7 together from when I went on the job. Anything at all
8 that the foreman had to do, he always sent me and Johnson
9 to do it.

10 Q When you lifted up the heavy rods to put up
11 on the bars, there was more than just you and Johnson
12 lifting the bars, weren't there?

13 A I don't know which one of the --

14 Q Did you ever lift rods or bars with five or
15 six men on the bar?

16 A Yes. Several times.

17 Q Many times, right?

18 A Yes.

19 Q That was practically the whole job down there,
20 wasn't it?

21 A Not the whole job.

22 Q The cofferdam?

23 A Most of that time it was me and Johnson. The
24 foreman always keep me and Johnson as a team working to-
25 gether.

1
2 Q How many times would you say you lifted bars
3 with more people than just you and Johnson?

4 A During the seven to eight nomths I couldn't
5 definitely say the amount of times.

6 Q Was it more than once?

7 A More than once, more than twice, more than
8 four, five, six times.

9 Q More than ten or eleven?

10 A Could be more than that, too.

11 Q More than twenty-five or thirty?

12 A Could be.

13 Q More than fifty?

14 A It could be. I wouldn't definitely say exactly.

15 Q You did it quite often, didn't you?

16 A Yes. When they had a job and they wanted all
17 the gang to do it.

18 Q So five or six men would get on the bar and
19 lift it up; isn't that right?

20 A Sometimes. Sometimes maybe eight. Because
21 sometimes they put in two more men.

22 Q What I'm getting at, Mr. Foreman, is it was
23 more than just you and Mr. Johnson to lift the bar,
24 wasn't it?

25 A It depends on the job we're doing.

1
2 Q I'm talking about the time when you needed
3 more than two men.

4 MR. DUNBAR: Objection. He's on cross
5 examination.

6 Q THE ADMINISTRATOR: Let's get on with it.

7 Q I said on the occasions when more than you
8 and Johnson lifted these bars there were maybe five or
9 six men on the bar.

10 A Or eight.

11 Q Or eight?

12 A Yes.

13 Q How heavy are those bars, do you know?

14 A Sometimes they are Number 11 or Number 13 bars,
15 thirty foot long. I can remember an instance where only
16 me and Johnson lifted bars thirty feet long.

17 Q Were you ever told that you were standing too
18 close to Johnson when you lifted the bars; that you weren't
19 carrying your weight?

20 A No.

21 Q Did you ever get on the end of the bar and
22 pick it up while everybody else has the heavy weight on
23 the other end?

24 A It depends on your position. You pick the bar
25 up in your position.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q And you always managed to stand next to somebody, right?

A I have to be standing next to someone if there are six or seven of us standing together. I'm not segregating myself from everyone.

MR. COLLERAN: I object to counsel talking to the Witness in the middle of the examination.

THE ADMINISTRATOR: I indicated that we would hold this informally. But I think you're quite right, Mr. Colleran.

BY. MR. COLLERAN:

Q When you talked to the shop steward, Mr. Murray, Mr. Murray didn't know the reason why you were being laid off?

A Yes. He told me he doesn't know the reason.

Q He told you he doesn't know the reason, right?

A Yes.

Q Nobody had told him?

THE ADMINISTRATOR: Don't shrug your shoulders.

A Yes. I don't know if anyone told him.

Q You say on that Friday you couldn't find Mr. Linner on the job to ask him?

A Mr. Linner was on the job but he wasn't paying me no attention.

1

2

Q Did you go up and talk to him?

3

A No.

4

Q Did you try?

5

A I spoke with the Union representative.

6

Q Did you ever have a conversation with Mr.

7

Linner in the seven months you were on the job?

8

A Yes. Many times he comes in and talks to us.

9

Q What did Mr. Linner ever say to you; do you

10

recall any conversations you had with Mr. Linner?

11

A Sometimes he may come around and he says

12

something. Maybe I can't really recall it.

13

Q Did he ever compliment you on the work you

14

were doing?

15

A Well, yes. He may give you something to do

16

and he says, "That's a nice job."

17

Q He did say that to you?

18

A Yes.

19

Q But he never said you were doing a bad job?

20

A Not that I can remember.

21

MR. COLLERAN: That's all I have.

22

THE ADMINISTRATOR: Is there anything else,

23

Mr. Dunbar? Mr. Raff? Mr. Siegel?

24

MR. DUNBAR: Not at this time, no.

25

MR. SIEGEL: No.

1
2 THE ADMINISTRATOR: Is there anything else
3 that you want to tell the Administrator? You have
4 no proof in addition to this?

5 (No response.)

6 All right. That's his charge.

7 (Witness excused.)

8 MR. COLLERAN: I move that the grievance be
9 dismissed at this point. There is not sufficient
10 proof to indicate that he was discriminated against.

11 THE ADMINISTRATOR: This is informal and I
12 will not formally respond to the motion to dismiss.
13 I don't know that, basically, it's helpful in
14 establishing some helpful guidelines for everybody
15 concerned with respect to the rights and obligations
16 of people on the job.

17 I think it would be better if I say something
18 by way of some resolution of the charge. I would
19 prefer to do that in writing.

20 However, Mr. Colleran, let me say this much.
21 I think that the responsibilities of the Administrator
22 -- which, over the years, the Administrator has
23 tried to fulfill with some measure of the realities
24 of the relationships that we are talking about --
25 the nature of the question of the hiring hall, a

1
2 little bit about what it is to be a lather on a
3 construction job.

4 One question occurs to me. That is, what
5 does the Administrator, just as presumably a person
6 charged with supervising the implementation of the
7 settlement agreement -- what inferences is an
8 Administrator to draw from the fact that an employee
9 or a workman or a lather -- whether he's a permit
10 holder or journeyman -- works continuously for
11 seven months on a job with no proof that he got
12 drunk, no proof that he dropped an iron rod on
13 somebody's head, no proof that he went berserk in
14 some way, no proof that he showed up at eleven
15 o'clock to report for work when the gang has got to
16 start at eight, no proof that the work force was
17 diminished or shrunk, which may explain a layoff.

18 The permit-holder comes before the Administrator
19 and says, "I worked for seven months and I was laid
20 off. I was never criticized or reprimanded and I
21 was laid off, and never got an explanation."

22 The burden to go forward is on somebody.

23 MR. COLLERAN: The allegation is that it was
24 a discriminatory layoff. Discriminatory for what?
25 For racial reasons?

1
2 MR. DUNBAR: It violated the consent decree.
3 The consent decree is that layoffs are to be in
4 inverse order of hiring, with possible exception
5 for cause.

6 MR. COLLERAN: There is no evidence showing
7 that he was not laid off in the order of sequence.

8 MR. DUNBAR: If you want us to go through
9 the perfunctory explanation of showing that someone
10 on the job for seven months was not the last man to
11 be hired --

12 MR. COLLERAN: I made a motion to dismiss be-
13 cause I didn't think they had substantiated their
14 charge.

15 THE ADMINISTRATOR: I know. But I think I
16 said at the outset that I would reserve decision.
17 I also said at the outset that I was not going to
18 conduct this investigation or inquiry on technical
19 grounds.

20 I don't know that Mr. Foreman is in a position
21 to know what his seniority status is. I don't know
22 even if there is a seniority list kept on these jobs
23 other than what appears to be on the company's
24 payroll records. I have to take that into account.
25

1
2 Again, I am trying to be realistic, Mr.
3 Colleran, which is the one thing I said to you
4 that has been kind of a touchstone.

5 MR. COLLERAN: I realize that. But here we
6 are with a big group taking a formal record. You
7 are charged with making a determination in a case
8 that could have serious consequences to the Union.
9 So I don't think that we can be that informal that
10 we can't make our objections known and put them
11 on the record.

12 THE ADMINISTRATOR: If you don't want to go
13 forward, I will ask Mr. Foreman some questions
14 which will satisfy me.

15 MR. COLLERAN: You misconstrued me.

16 THE ADMINISTRATOR: I will ask him whether
17 the job is still operating, how many lathers are
18 still on the job to the best of his knowledge, and
19 whether any of them were hired, to the best of his
20 knowledge, after he was.

21 MR. COLLERAN: At the conclusion of each case
22 a motion is made to dismiss if you don't think the
23 party made a case. So I made my motion. You reserved
24 decision and are going forward. I just want to
25 put on the record what my objections are.

THE ADMINISTRATOR: I appreciate your attention to your responsibilities, Mr. Colleran. I think I have never treated them cavalierly.

MR. COLLERAN: I'm not saying that you're doing that now. I have no intention of having the record reflect such an attitude.

I call Mr. Linner.

J O H N L I N N E R was called as a witness on behalf of the Union and testified as follows:

DIRECT EXAMINATION

BY MR. COLLERAN:

Q Mr. Linner, by whom are you employed?

A Perrini North Incorporated

Q In what capacity?

A As a lather foreman.

Q Is that also known as a deputy foreman?

A Yes. Assistant foreman. Mr. Kruckel is a general foreman and there are numerous subforemen.

Q The grievant, David Foreman, was employed on that job.

Was he under your supervision?

A Yes, he was.

Q Was that in the cofferdam gang?

A Yes.

1
2 Q Would you give the Administrator some des-
3 cription of the kind of work that is being performed in
4 the cofferdam?

5 A Basically, you started out with a series of
6 slabs you had to bring up forty feet. They were poured
7 in series of four foot. It was an area about 150 x 150
8 foot. It came up not level but in a splay of certain
9 sections. And there were sections for it that the
10 sewage would later on be channelled through these cuts
11 in it.

12 Once we came up to what we called finish
13 elevation on the slabs -- I don't think you want numbers
14 on that.

15 Q No. Just the general description.

16 A Once you came to the top elevation of the
17 slabs, there were a series of dowels to put in, thousands
18 of them. From there on you built up a five-foot wall all
19 around it. That's a cofferdam.

20 Q Could you describe the kind of work that the
21 lathers under you had to perform?

22 A In the first stages there were regular slabs,
23 the bottom mat, top mats. In this slab area there were
24 also wall dowels to put in to bring up. These slabs
25 were twenty-foot slabs. Some sections were even more.

1
2 THE ADMINISTRATOR: Excuse me. Does a slab
3 come prefabricated?

4 THE WITNESS: No. It's a cofferdam down in
5 the water.

6 A (continuing) Anyway, they put down a work mat.
7 On top of the work mat, that's where I would lay out the
8 work, tell the men where the steel goes in; nine inches
9 on center, and you would cross it with a certain amount
10 of steel in a section and tie it off.

11 Then you would go on to the next area. At
12 various stages you would put a bottom mat in. Some
13 sections of the pour had a splay mat in it, other sections
14 had just walls in it where the cuts were from channels.

15 This cofferdam on the bottom slab was broken
16 down in seventy-two different pours, concrete pours,
17 because it was so large; and also elevations, one on top
18 of the other.

19 When that phase of the job was completed there
20 was like I say a five-foot wall all around it. It went
21 up approximately fifty feet, the wall. We started the
22 wall approximately at the end of August, September, I
23 believe, something like that.

24 This is where, on the wall, if you're familiar
25 with it, this is where we're hanging all the bars.

The way we made it up, we had two series of elevations on your mats. The vertical bars of approximately twenty-five feet, we would drop them in with a crane; have them made upstairs, prefabricate them in sixteen-foot sections, drop them down.

ce we got a section of verticals in, we would drop down horizontal. Usually you start out with a corner of twenty, thirty foot center. Some were thirty-six-footers, some were thirty-two, some were forty, even, in various areas.

Once we hit these walls you would drop a certain number in; because on these walls they only poured it about four-foot-six. So in each pour was, approximately, fourteen inches on center. So in each pour you would get approximately four to six horizontals on each face. Sometimes there were more bars.

What the men would do, they would drop it in, we would spread the men out on a bar, they pick it up, tack the bar onto a wall, move to the other side.

Q How many men would you need to lift one of those bars?

A On a Number 9, thirty-footers, we put five or six men on. Because you are talking like there were mostly Number 9 bars. This was you have the men there.

everybody spreads out on a bar, everybody has about five foot and nobody is going to break their back. Two men you don't have on a thirty-foot. Because what happens on that situation is one man can only pick up an end and one man ties. It takes you about five times as long to do it that way. That's why we put six, seven men sometimes on it.

Then you tack up all these bars. Then you drop back after they're all tacked up.

Q Did Mr. Foreman do this kind of work?

A Yes, sir.

Q As his deputy foreman, were you in charge of his work gang?

A Right.

Q How did you find his work performance?

A Not satisfactory. That's why I finally laid him off.

Q Tell us in what respect it wasn't satisfactory.

A He made the statement that I originally made, in a way.

Q You have to testify. He made a statement of human rights. That's not part of our case.

A When he came on the job he was inexperienced and we worked him alone. When we were on the slabs we

1
2 did one floor at a time. So I had maybe seven or eight
3 men right under my control who I could stay right with.
4 I had to tell them a lot of times, sometimes move faster,
5 sometimes correct work

6 When we came to the situation where you
7 dowelled out an area, they would put out a template --
8 it's like a guide, supposed to be three inches in from
9 the concrete and then would be held at a certain elevation
10 out. So we would have this guide set up.

11 Then you would have men go ahead to get a
12 setup made, mark it out, have other men come through and
13 fill in these bars.

14 The whole thing is you would have to eye it
15 up, put it on the mark, and you hold it on the right
16 side of the template. Otherwise you're going to be out
17 of the concrete if you hold it on the wrong side.

18 Mr. Foreman, he mentioned that I never corrected
19 him. There were a few times on the dowels I corrected
20 him; he was holding the wrong side. He was going down.
21 He would have a few on one side of the template and a
22 few on the other side of the template. So we had to go
23 back and rip the work out and put it back in the way it
24 called for. That was still on the slab area.

25 Also down on the slab area, when we hit the

1
2 longer bars, I had to say to Davy many times about spread-
3 ing out on a bar. If you're standing next to the guy,
4 you don't have any weight. You have to spread out and you
5 have to work together when you start picking up bars.

6 As we progressed -- do you want me to keep
7 going on this?

8 Q Did there come a time when it was determined
9 that Mr. Foreman should be let go? Did there come a time
10 when you decided to let Mr. Foreman go?

11 A Hes. I decided, after seven months and the
12 guy still wasn't picking it up, that I couldn't carry
13 him that much longer. Because a lot of the guys come out
14 of the hall and don't know that much. But they do pick
15 it up. That's the only way you're going to learn. And
16 eventually they turn into really good mechanics. And
17 they use their initiative and learn.

18 There was one statement Mr. Foreman made about
19 the only time he would do anything is when the foreman
20 told him. If you had that situation in construction or
21 in any other business, I don't think you would get any-
22 thing done at all.

23 In gang construction work, you are working
24 two, three men together. If the foreman has to say,
25 "pick up that bar and that bar and pick up that bar,"

1
2 you would never get anywhere. So you work in a gang and
3 the guys all work together, "let's get this, let's get
4 that." They work it out among themselves.

5 This is one of the things with Davy. He
6 would stand there, wouldn't move unless I say, "Pick
7 that up."

8 Once you have the vertical bars up, the only
9 way to go to the next pour -- I had the lathers pick a
10 certain section. You would swing them over with a crane
11 and have guide ropes on each end. A guy would get up on
12 each end of the form. You would grab each end of the load
13 and you would bring it down nice and easy between the walls.

14 You would have one guy on the wall. I could
15 come down and Davy is standing there. The other guy is
16 standing up there with the rope trying to bring it down
17 himself.

18 I says, "Hey, Davy, get up there and help the
19 guy. You shouldn't have to wait for the foreman to tell
20 you that."

21 Then there was an accident, a lot of hear-
22 say. I don't know about hearsay. I just know what I
23 said and what I heard. Wherever I put him I wasn't
24 getting what I should be getting out of the gang. And
25 it always fell down. Whoever I spotted him with, the job

1
2 wasn't the same. Because most of this work was all
3 repetition. It was one wall after another. A few add-
4 bars here and there, but basically it was the same.
5 When Davy got into an area, it just didn't work out.

6 Maybe what he said, that was the answer:
7 He wasn't going to do anything himself unless he had a
8 direct order from me.

9 Q Did you ever warn Mr. Foreman he was going
10 to be fired if he didn't pick up his work?

11 A I told him a lot of times. A lot of guys
12 hear that: if they don't pick up, they go.

13 Q Did you ever say it to Mr. Foreman?

14 A I said it to him. I also mentioned to him
15 about coming in late. The shanty was roughly a hundred
16 yards from the cofferdam, whatever. Coming out of the
17 gate, Davy would be coming walking the other way.

18 We start at 8:00. That means you have your
19 clothes on, you're dressed, your tools. Now he's coming
20 in to get dressed. The other guys are down there start-
21 ing work and he comes strolling down the steps. I men-
22 tioned that to him a few times, too.

23 Q Are you familiar with the incident involving
24 Mr. Peters on the burning of the rods?

25 A I remember going down there vaguely about it.

1
2 I told him to burn some -- they were away at a dock-
3 builder's. It was a two-man job. You can't burn a
4 vertical bar.

5 By the time I got down there -- it took a
6 long time to burn a couple of bars off. But really it's
7 kind of vague in my mind. There were a lot of little
8 incidents on the job.

9 Q So at what point in time did you decide to
10 let Mr. Foreman go?

11 A There was a time when Peters, he got hurt.
12 Then I put him up on a wall over there when they were
13 doing this outside dowels. I had him working with Ronnie
14 Duggins and Vinnie. And I finally went up to Gene and
15 said "I don't need him any more. I'm not getting the
16 work out." Every place I would put him I would have to
17 stay right there.

18 That was one of the reasons he doesn't see me
19 at the end of the day: because I was down in the tunnel.
20 When they left we were at some sections of the wall where
21 they were all the way up. So I sent down into the tunnel.
22 The walls were broken up into six different pours on the
23 vertical sections. If I wasn't with them, I didn't get
24 any work. And you can't do a job that way.

25 Q Mr. Linner, was there a reduction-in-force

1
2 imminent at that time?

3 A Where? In the cofferdam?

4 Q Yes.

5 A We still had some work to go then, in a way.
6 We didn't finish that for a while. That was what,
7 December, right? We had another month on the walls and
8 everything. And we had a little pickup work down below.

9 Q So it was your judgment that Mr. Foreman was
10 not working productively and should be terminated; is
11 that correct?

12 A That's right.

13 MR. COLLERAN: That's all I have.

14 CROSS EXAMINATION

15 BY MR. DUNBAR:

16 Q Mr. Linner, you mentioned that Mr. Foreman
17 put the dowels in the wrong side of the templates when
18 you were making slabs.

19 A Right.

20 Q Was he the only person to do that in the gang?

21 A More so.

22 Q In other words, others did that? And you had
23 to mention to them that they had to pull on the other side?

24 A Right.

25 Q Do you consider "move faster" or "correct a

1
2 minor error like this" to be a real job criticism?

3 A There wasn't only one time we had to correct
4 a situation like that. This happened numerous times
5 where we had to say, "Watch your height ..." --

6 Q But, in fact, you corrected other people the
7 same way.

8 A But more so I corrected David. I also fired
9 other people down there also for nonperformance, in my
10 judgment.

11 Q You fired other people during the time that
12 Mr. Foreman was employed?

13 A Correct

14 Q How long had they been on the job?

15 A They were on the job a few months.

16 Q In other words, someone who was on the job
17 only a couple of months you fired?

18 A Were they longer than that? I don't know
19 exactly how long. They were down with me three days and
20 I wasn't satisfied with their work and I asked the foreman
21 to get their money because I wasn't satisfied.

22 Q In other words, you're telling me that in
23 three days you could make a decision about somebody's
24 work performance and can him on the spot; where Mr.
25 Foreman obviously wasn't that serious because he lasted

1
2 seven months without being canned; is that right?

3 A When I fired the fellows, they were on the
4 wall. Mr. Foreman lasted all that time because we had
5 slabs to do down there, a different phase of the job.
6 Then we had -- I don't know if you're familiar with the
7 slabs -- I had the whole gang of six or seven men.

8 I could stay right there with him.

9 Once we hit the walls, it was a different
10 story. I needed a little more initiative and you couldn't
11 be standing right with him.

12 Q Was Mr. Foreman ever involved in building a
13 wall?

14 A Sure. He was there for three months on the
15 walls. And we had walls down below actually coming out
16 in the slab.

17 Q So Mr. Foreman worked for three months on a
18 wall. And you didn't feel that he was incompetent
19 enough to be fired in three days, as you did someone
20 else who also worked on a wall?

21 A Right.

22 Q Why did it take you so long to make a decision
23 about Mr. Foreman? It took you seven months, as opposed
24 to three days.

25 A First of all, he wasn't a smart fellow or any-

1
2 thing. He tried, in a way. But he wasn't picking it up.
3 A lot of guys pick it up. Some pick it up faster, some
4 don't. So in the slabs he wasn't that bad. It was once
5 when he hit the dowel area and the wall area it wasn't
6 working any more. Plus, he was not improving at all.
7 That's the biggest thing. There was no sign of improve-
8 ment. If anything, he was getting worse. And it was
9 getting worse at the end there because I had to stand
10 right over him. That's why finally I had to get rid of
11 him, in a way.

12 Q How about this other gentleman that was his
13 gang member that was also fired at the same time?

14 A Vinnie Johnson, yes.

15 Q What was his work problem?

16 A He has a tendency to wander. He would be
17 out making phone calls, working on a car. A couple of
18 times Gene found him out at the car and he says to me,
19 "Hey, ain't he working for you?"

20 Q Why didn't you discharge him immediately?
21 You already said that you discharged somebody after three
22 days if you didn't like what they did.

23 A I'm trying to give the guy a break. That's
24 what I was trying to do.

25 Q Did you keep any written record of any

1
2 warnings that you gave Mr. Foreman?

3 A No. We don't have anything like that in
4 this business. The only writing I do is to write on the
5 wall what goes in an area. That's about all. No memo-
6 randums or things like that.

7 MR. DUNBAR: I have no further questions.

8 REDIRECT EXAMINATION

9 BY MR. COLLERAN:

10 Q Mr. Linner, the two fellows that you fired,
11 were they white or black?

12 A They were white.

13 MR. COLLERAN: Okay.

14 MR. DUNBAR: No further questions.

15 THE ADMINISTRATOR: Anything else?

16 Mr. Siegel, do you wish to inquire?

17 BY MR. SIEGEL:

18 Q Is it correct that Mr. Foreman did not speak
19 with you after he was laid off?

20 A Right.

21 Q Did you amke any comment to him?

22 A No. At the time I was downstairs. I don't
23 know what time he got his money exactly. When I came up
24 they were gone.

25 MR. SIEGEL: No further questions.

(Witness excused.)

THE ADMINISTRATOR: Is there anything else, gentlemen?

MR. COLLERAN: I have a couple of other witnesses.

Mr. Peters.

R I C H A R D P E T E R S was called as a witness on behalf of the Union and testified as follows:

DIRECT EXAMINATION

BY MR. COLLERAN:

Q Mr. Peters, are you a permit man with Local 46?

A Yes, I am.

Q Were you employed at the North River Perrini job?

A I was.

Q Did you work in the cofferdam gang?

A I worked with that gentleman there. He was foreman.

Q Did you work in the cofferdam gang?

A Yes.

Q Under Mr. Linner?

A Right.

Q Did you have occasion to work with Mr. Foreman?

A On many occasions.

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Q Did you ever hear Mr. Linner complain to Mr. Foreman about his work?

A Yes.

Q What did he say to him?

A If he didn't start moving he'd have to go.

Q How many times would you say you heard this kind of a comment?

A I was there a couple of months. He even saved him one time on an occasion. He told him to go; then he changed his mind; he would give him another chance. But on the last chance he had to let him go.

Q Did you have an occasion when Mr. Linner directed you and Mr. Foreman to burn steel?

A Yes. At 8:00 o'clock in the morning he told me to take Mr. Foreman down in the dam with me. And I do the burning. He didn't know how to burn.

So I had everything hooked up. And the bars are heavy and one man had to hold the bar.

So I says to him, "Do you mind holding the bar?"

He turned around and says to me, "You ain't the foreman. You don't tell me what to do."

So I was standing there like a dope and he comes down and says, "What are you doing?"

1

2

I says, "He don't want to work with me."

3

Q And he didn't work with you at that time?

4

A No. I had to ask one of the carpenters to hold for me because they wanted to get in there.

6

Q Did he indicate to you that he objected to you telling him what to do?

8

A He certainly did. That's what it sounded like. He said, "I want the foreman. Don't you tell me what to do."

10

11

Q Did you ever have occasion to work lifting the rods with Mr. Foreman?

12

13

A Yes.

14

Q Will you tell us what your experience was in that respect?

15

16

A We have five or six men on the bar, and him and his partner were also on the end of the bar. And anybody knows that the weight is in the middle.

17

18

19

Q Who was his partner?

20

A Vinnie.

21

Q Vinnie Johnson?

22

A Right.

23

Q As a result of that kind of lifting did anything happen to you?

24

25

A I hurt my arm and it had taken me three months

1
2 to get that job and it was getting around to the holidays.
3 So I just held on with the pain for a while, as long as
4 I could.

5 Then I walked up to first-aid and they put a
6 bandage on it and I lost a couple of days work.

7 When I come back Mr. Foreman was gone.

8 MR. COLLERAN: That's all I have.

9 CROSS EXAMINATION

10 BY MR. DUNBAR:

11 Q Mr. Peters, when did you start working for
12 Perrini North River?

13 A October 1974.

14 Q So, in fact, you couldn't have heard any
15 complaints about Mr. Foreman's work before that. You're
16 only speaking in terms of October and November.

17 A I heard complaints. I was down in the hole.
18 Even the men complained about him.

19 Q Were you present when Mr. Linner allegedly
20 told Mr. Foreman to go burn these rods with you?

21 A Yes. We were standing together outside the
22 shanty and he assigns everybody to a different job.

23 Q When Mr. Foreman allegedly refused to help
24 you burn these rods, was he discharged for that?

25 A Was he what?

1

2

3

Q Was Mr. Foreman discharged for that insubordination of refusing your order?

4

5

A He just walked away from me, that's all, because I told him what to do.

6

7

8

Q Was he fired for it?

9

10

A No. Not for that incident. But he got a warning.

11

12

13

Q How many times did you generally, per day, lift these heavy bars with five or six guys?

14

15

16

A How many times? You lose count.

17

18

19

20

21

22

23

24

25

Q I don't know.

Mr. Colleran seems to think that Mr. Foreman can remember how many times over seven months he lifted the bars. So it seems to me that you could remember over the course of one day.

MR. COLLERAN: That's an argumentative question, Mr. Administrator.

MR. DUNBAR: I'll withdraw that question.

A I could say I did it a hundred times a day and I would be telling the truth.

Q You're telling us that Mr. Foreman and Mr. Johnson always, without fail, on these hundred times were at either end or at the same end?

A Sometimes there were together.

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Q In other words, they were the last two guys
on one end?

A On one end.

Q Are you blaming Mr. Foreman for you hurting
your arm?

A Am I blaming him?

Q Yes. Because you testified that on one of
the occasions that you and Mr. Foreman and Mr. Johnson
and others were raising a bar your arm was hurt.

A They weren't lifting their end.

Q Are you blaming him for hurting your arm or
the hurt that you suffered?

A I lost a couple of days' work. I could blame
him for that.

Q What did you do after you hurt your arm?

A I went up to the first-aid man. I told him
I had gotten hurt and had to go take care of it.

Q Did you do that right away? Did you go to the
first-aid station right away?

A Right away when I come up out of the dam.

Q Was that right after you hurt your arm or did
you keep lifting for a while?

A I kept lifting for a while.

Q In other words, your arm wasn't hurt so seriously

1
2 that you couldn't lift?

3 A Hurt enough to have a pain in there.

4 Q I understand that.

5 But it didn't hurt enough to impair your
6 ability to lift these bars?

7 A I had to leave the hole. I was no good to
8 them.

9 Q Did you file an accident report about this
10 with the company?

11 A I turned it in to the male nurse. He put it
12 in a book, the time of the accident and what happened.

13 Q You did file an accident report. Okay.

14 A Yes.

15 Q Was Mr. Foreman fired for for -- I don't know
16 what he did -- not holding up his end of the rod that
17 caused your injury? I mean that's a pretty serious charge,
18 saying that somebody was the cause of an injury on the job.

19 Do you know whether Mr. Foreman was fired
20 for that?

21 A I figured they weren't picking their weight,
22 the only thing.

23 Q Was Mr. Foreman warned in this report or was
24 he mentioned in any way in your accident report?

25 A No.

1
2 Q Did your accident report say 'Foreman didn't
3 hold up his end so I sprained my shoulder'?

4 A No. Because I knew he had a habit of being
5 told to move in on that bar.

6 MR. DUNBAR: Thank you very much, Mr. Peters.
7 BY MR. SIEGEL:

8 Q Can you just describe what happened for the
9 record? I don't understand what happened. I understand
10 your arm was hurt. But I don't understand what happened.

11 How many of you picked the rod up?

12 A Five or six.

13 Q Then it dropped?

14 A It dropped and I was hit here.

15 Q Do you remember where you were in the line
16 of people?

17 A In the middle.

18 Q Where was Foreman?

19 A On the end.

20 Q And you dropped it on the end and it hurt
21 your arm in the middle?

22 A It comes down. It's a heavy bar.

23 Q You're telling me that the men on either side
24 of you did not hold it?

25 A The other two men were tying at this time.

1
2 One man has to hold the middle and the other two men have
3 to get a quick tie in. They didn't get to make the tie.

4 Q How many men were holding the bar?

5 A How many men were holding the bar at the time?
6 I guess the other four fellows had their hand on it.

7 MR. SIEGEL: I don't have any more questions.

8 THE ADMINISTRATOR: Thank you, Mr. Peters.

9 (Witness excused.)

10 THE ADMINISTRATOR: Anything else, Mr. Colleran?

11 MR. COLLERAN: Yes. Mr. Duggins.

12 R O N A L D D U G G I N S, called as a witness on
13 behalf of the Union, testified as follows:

14 DIRECT EXAMINATION

15 BY MR. COLLERAN:

16 Q Mr. Duggins, are you employed at the North
17 River Perrini job?

18 A Yes, I am.

19 Q As a lather?

20 A Yes.

21 Q Do you have a permit in the lathers' Union?

22 A Right.

23 Q When did you start to work on that job?

24 A I've been there about a year and a half.

25 Q Who was your immediate supervisor?

1

2

A When I first got there?

3

Q All right. When you first got there.

4

A I was working in the yard then. Mr. Kruckel

5

here.

6

Q Then at some point in time were you trans-

7

ferred to the cofferdam gang?

8

A Yes. That's right.

9

Q When was that; do you remember?

10

A When they first started the cofferdam.

11

Q Was Mr. Linner your immediate supervisor

12

there?

13

A Yes.

14

Q Did you ever work with Mr. Foreman?

15

A Yes.

16

Q With Mr. Johnson?

17

A Yes.

18

Q Did you ever hear Mr. Linner complain to Mr.

19

Foreman about his work performance?

20

A Yes.

21

Q What did he say to him?

22

A He said, "You have to produce." He told

23

everybody the same thing. He tell it to me, tell it to

24

everybody.

25

Q What did he say specifically to Mr. Foreman?

1

2

A That if he don't produce he going to have to

3

go.

4

Q Did Mr. Linner ever say that to you?

5

A He told me to produce, you know.

6

Q Everybody has to produce; is that right?

7

A Right.

8

Q Did you hear Mr. Linner speak directly to Mr.

9

Foreman and tell him if he didn't shape up he was going

10

to lose his job?

11

A Yes.

12

Q Did you hear him say that on a number of

13

occasions?

14

A Maybe twice. I couldn't say no more than

15

twice.

16

MR. COLLERAN: That's all.

17

MR. DUNBAR: No questions.

18

THE ADMINISTRATOR: Mr. Siegel, any questions?

19

BY MR. SIEGEL:

20

Q Mr. Duggins, were any promises made to you

21

with respect to your testimony here today?

22

A None.

23

Q Were any threats made to you?

24

A None.

25

MR. SIEGEL: That's all I have.

(Witness excused.)

MR. DUNBAR: Is that your last witness?

MR. COLLERAN: Yes.

MR. DUNBAR: So far, our case has only involved the actual layoff.

I would like to put in testimony about the complicity of the Union and the ratification of the Union itself of Mr. Foreman's layoff.

THE ADMINISTRATOR: Go ahead.

MR. DUNBAR: I would like to call Mr. McGovern, please.

PETER MCGOVERN, called as a witness on behalf of the Complainant, testified as follows:

DIRECT EXAMINATION

BY MR. DUNBAR

Q Mr. McGovern, are an employee of Local 46?

A I am.

Q What is your job?

A Business agent.

Q What are your responsibilities as business agent?

A They vary. Quite a few of them.

Q Do you want to expound on that? With regard to dissatisfied members of your union, either dissatisfied

1
2 with an employer's action or a fellow member's action,
3 do you have any responsibilities in that regard?

4 A Every day.

5 Q Did Mr. Foreman come to you in December
6 about his problem?

7 A Yes, he did.

8 Q What did you do about his problem?

9 A I spoke with him out in the hiring hall.
10 I said, "Wait out here until I investigate." I called
11 up the job and I spoke to Gene Kruckel; Johnny Murray,
12 and I believe Mr. Linner.

13 Q What was the substance of those conversations?

14 A The guy wasn't pulling his weight, he was
15 late quite a few times getting in there with the gang.

16 He told Mr. Peters he was an old man, to take
17 it easy, it was a long job.

18 I come out and I told him. I went to the job
19 the following day to talk to these people in person.

20 Q The same day -- that was the day after you
21 called?

22 A That's correct.

23 Q When Mr. Foreman was in the office after you
24 called the job, did you go out into the hiring hall and
25 approach Mr. Foreman to tell him what had occurred?

1

2

A I told him he wasn't doing his work.

3

4

Q What reason did you give that the company had given for the layoff -- "the company" meaning Mr. Kruckel and Mr. Linner?

5

6

7

A That he wasn't doing his work. He was late a few times.

8

9

10

Q Mr. Foreman has testified that you told him that he was laid off because he told other workers not to work hard or to slow down.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Did you tell him that, Mr. McGovern?

A I don't recall that.

Q You testified that you further went out and investigated Mr. Foreman's grievance on the job site the following day.

A That's correct.

Q Did you ever get back to Mr. Foreman about the outcome of this investigation?

A He never come back to the hall again.

Q But you never got back to him? You never dropped a note in the mail or anything else? You just made no effort whatsoever?

If Mr. Foreman didn't sit on your doorstep, you weren't about to inform him of anything; is that true?

A That's the way it's generally handled. Gen-

1
2 erally when somebody has a valid complaint they're on
3 your back until you settle it, and I mean on your back.

4 Q In other words, after Mr. Foreman approached
5 you about this, did you tell him that you were going to
6 go out to the job site and investigate it?

7 A I didn't say anything to him. I told him
8 about my telephone conversation.

9 Q In other words, after your telephone conver-
10 sation and your report back to Mr. Foreman, Mr. Foreman
11 had no way of knowing that you were going out to the job
12 site so he would have no reason to approach you at the
13 Union hall, figuring that you had done everything that
14 you were going to, and that was that.

15 So, under those conditions, wouldn't it seem
16 reasonable to you that you would want to inform Mr. Foreman
17 of the results of your investigation, since he had no way
18 of knowing you were going to investigate?

19 A We have people being laid off every day and we
20 certainly don't go to their homes to notify them about
21 our investigations.

22 Q There is something known as the U.S. mail.
23 It's not the most efficient form of transmittal but it
24 sometimes works.

25 A Yes.

1

2

3

Q You honestly expected Mr. Foreman to come in and keep bothering you?

4

5

A To come in and register for work, the same as everybody else does.

6

7

8

9

Q I'm talking about his complaint. You expected him to come back and keep complaining after you told him that you felt his layoff was justified. But he didn't know you were going to go out to investigate.

10

11

12

How would he know to come back and ask for the results of an investigation if he didn't even know there was going to be an investigation?

13

14

A I mean a layoff isn't the end of the world. It's tough, but not the end of the world.

15

16

17

18

19

Q I still fail to understand how you can expect Mr. Foreman to come back and try and find out what happened to his grievance when he didn't even know you were going out to the job to investigate. He thought your investigation was over when you got a phone call.

20

21

Q Is Mr. Foreman familiar with Section 7 of the consent decree?

22

23

24

25

Q I doubt it.

A Did he ever receive a copy of it?

Q I can't testify for Mr. Foreman. I have no idea.

1
2 A It says there that any workman who challenges
3 the basis of his layoff shall set forth in writing --

4 MR. DUNBAR: Objection.

5 A And the workman shall be terminated --

6 THE ADMINISTRATOR: I can't cut him off.

7 MR. DUNBAR: He's not answering a question.
8 He's asking a question.

9 An objection was raised when he was asked
10 whether Mr. Foreman had received a copy of the
11 consent decree.

12 THE ADMINISTRATOR: I will allow his response
13 to stand.

14 Gentlemen, I indicated at the outset that I
15 would not institute the formalized measures to
16 control the situation. We are not dealing here
17 with expert witnesses. We're dealing with people
18 who are in the construction industry who carry iron
19 rods and pour concrete.

20 BY MR. DUNBAR:

21 Q Mr. McGovern, you have read this consent
22 decree. When Mr. Foreman came to visit you, you could
23 tell by casual observation that Mr. Foreman was black.

24 What do you think of your obligations under
25 this consent decree to a black like Mr. Foreman?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. COLLERAN: I object.

THE ADMINISTRATOR: I will allow it. Let's go on.

MR. COLLERAN: That's a question that you could answer for hours.

THE ADMINISTRATOR: We will see if Mr. McGovern answers for hours.

MR. COLLERAN: I don't see the relevancy of it.

THE ADMINISTRATOR: He is asking what he thinks the Union's responsibility is in his person as a business agent.

Can you answer it, Mr. McGovern?

A To investigate the complaints that I get, among other things. And I have investigated many complaints.

Now, if Mr. Foreman thought that he was unjustly laid off after I spoke to him, and never coming back to the hall, at least he could have made a phone call himself to see if any further action was taken.

MR. DUNBAR: Thank you very much. I have no other questions.

BY MR. SIEGEL:

Q Do you uniformly require people to file written requests to the Administrator before you act on their complaints?

1
2 A No. But I do call them up. When he calls
3 me up, then I really do it.

4 Q You only act after Mr. Moskowitz calls you up?

5 A No, sir. Let's say I give it a more thorough
6 investigation.

7 Q But you uniformly investigate complaints that
8 are brought to you when they are brought to you?

9 A Yes. It has to go into detail when Mr. Mos-
10 kowitz makes a request.

11 CROSS EXAMINATION

12 BY MR. COLLERAN:

13 Q When you told Mr. Foreman what the results
14 of your conversation was, did he say anything to you?

15 A He denied the allegations made by the foreman.

16 Q And that was it?

17 A Of course that was it.

18 Q You went to the job the next day to check it
19 out?

20 A The next day.

21 Q And Mr. Foreman never got in touch with you
22 again; is that right?

23 A Never did.

24 Q The date that Mr. Foreman spoke with you was
25 December 16th?

1

2

A That is correct.

3

Q 1974.

4

THE ADMINISTRATOR: What was the actual date of his layoff?

5

MR. COLLERAN: December 13th.

6

I would like to ask Mr. Foreman a question in this connection.

7

MR. SIEGEL: Wait a minute.

8

THE ADMINISTRATOR: Do you still have Mr. McGovern on the stand?

9

10

MR. COLLERAN: I'm finished with him.

11

BY MR. SIEGEL:

12

Q Did you ever tell Mr. Foreman on December 13th that you were going to investigate it?

13

A He didn't tell me anything.

14

Q No, no. Did you ever tell Mr. Foreman on the date that he came to you and complained that you were, in fact, going to investigate it and that he should get in touch with you later?

15

A No, I didn't.

16

THE ADMINISTRATOR: He said that before, Mr. Siegel.

17

18

MR. COLLERAN: I would like the record to show that on December 17th Mr. Foreman filed a

19

1
2 charge with the State Commission of Human Rights.

3 MR. DUNBAR: Objection. I believe that's
4 irrelevant.

5 MR. COLLERAN: I don't think it's irrelevant
6 at all. I think it indicates very clearly that Mr.
7 Foreman is well aware of what his rights are.
8 The next day he went down to the State Commission
9 of Human Rights and filed a charge.

10 THE ADMINISTRATOR: I will allow it to stand
11 for whatever it's worth.

12 MR. COLLERAN: That's all I have, Mr. Mos-
13 kowitz.

14 (Witness excused.)

15 THE ADMINISTRATOR: Anybody else, gentlemen?
16 Any further proof?

17 (No response.)

18 THE ADMINISTRATOR: All right. I will decide.
19 Mr. Siegel?

20 MR. SIEGEL: Maybe at this time it would be
21 a good idea to take up what the schedule of the
22 future proceedings will be.

23 THE ADMINISTRATOR: I haven't seen a letter
24 at all. I understand there is a letter in my office.
25 I have been out of my office since Wednesday. But

1
2 my secretary tells me there is a letter, among
3 others, among other correspondence since last
4 Wednesday.

5 You talked to me on the phone about it and
6 I told you to put it in writing and advise Mr.
7 Colleran.

8 Are you seeking now to ascertain the date;
9 is that it?

10 MR. SIEGEL: That's right.

11 THE ADMINISTRATOR: I don't think that we can
12 continue with that today. First of all, I don't
13 think there is enough time for that. We haven't
14 had a lunch break here. If we were to have a lunch
15 break we would go to later in the afternoon.

16 It appears to me that perhaps -- I don't know
17 prepared everybody is to go into anything like that.

18 MR. COLLERAN: I'm not prepared at all. And
19 I wanted to tell you that but you were up in Boston
20 when I called your office.

21 THE ADMINISTRATOR: Off the record.

22 (Discussion off the record.)

23 (Whereupon, at 2:30 o'clock p.m.

24 the hearing was concluded.)

25 o0o

May 5, 1975

I N D E X

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>
David Lloyd Foreman	17	21	
John Linne	33	43	47
Richard Peters	48	51	
Ronald M. Duggins	56		
Peter McGovern	59	66	

EMPLOYMENT LAW CLINICAL PROGRAM
OF THE
WASHINGTON SQUARE LEGAL SERVICES, INC.

49-51 Chambers Street, Suite 220
New York, New York 10007

(212) { 566-0239
566-1327

Director

David Kaff
Attorney-at-Law

May 28, 1975

George Moskowitz, Esq.
540 Madison Avenue
New York, N.Y. 10022

Re: David Foreman against
Metallic Lathers, Local 46

Dear Mr. Moskowitz:

Pursuant to our recent phone conversation, this letter sets forth, in summary fashion, our position on the above-captioned matter.

The jurisdiction of the Special Master, in this matter, derives from the Consent Decree of August 17, 1971, between Local 46 and the Federal Government before Judge Bonsal. The specific issue concerns the rights of Mr. George Foreman (hereinafter Complainant) under Article VII of the Consent Decree.

I. Complainant's Termination Was A Layoff, Without Just Cause, in Violation of the Consent Decree

The hearing disclosed a factual pattern with few instances of conflicting testimony. Mr. Foreman, a permit holder of Local 46, worked for seven months (Transcript p. 17). He was laid off on December 13, 1974 (p. 67). No reason for the layoff was given by the shop steward (p. 18) or Mr. Kruckel, the general foreman (p. 19).

Mr. John Linner, the deputy foreman, stated that he felt Mr. Foreman's work was unsatisfactory. However, Mr. Linner admitted that he frequently told all the men in the gang to speed it up (p. 38). He also admitted telling many of the men to step up productivity -- as he had told Mr. Foreman (p. 41).

073

II. The Union's Subsequent Conduct Served to Ratify the Improper Layoff

After his layoff, Mr. Foreman went to the offices of his Union to protest the unfairness of the layoff. Mr. Foreman spoke to Mr. Pete McGovern about the problem. Mr. McGovern's only "investigation" was to call the job site and then repeat the reason for layoff given him, to Mr. Foreman (p. 60). Mr. Foreman denied the allegations made by the employer to Mr. McGovern (p. 20). Mr. McGovern had no further contact with Mr. Foreman (p. 62).

Mr. McGovern then stated that he made a further "investigation" on Mr. Foreman's behalf (p. 60). He clearly indicated that Mr. Foreman was unaware of this and had no reason to suspect that Mr. McGovern was doing anything in regard to Mr. Foreman's complaint (p. 67). Indeed, Mr. McGovern did not in any way inform Mr. Foreman of the results of this investigation (p. 62). It is incredible that a union official does nothing to inform one of his own members of an investigation of that member's layoff. Mr. McGovern did not call Mr. Foreman; he did not even make an attempt to call him. Nor did he write him a letter or try to send him a telegram. In fact, Mr. McGovern did, literally, nothing on behalf of Mr. Foreman (p. 61). To make matters worse, Mr. McGovern does not even understand why he was expected to make some minimal effort on Mr. Foreman's behalf (p. 62, 63, 65). If nothing else in this case, certainly reasonable men, familiar with proper trade union practices, can agree that a telephone call is not a good faith effort to determine the validity of a termination.

The Union, through Mr. McGovern, their Business Agent, by his conduct, clearly ratified the wrongful layoff of Mr. Foreman. Therefore, the Union, under general agency principles, is liable for all damages that flowed from Mr. McGovern's conduct.

III. Remedy: Reinstatement with Full Back Pay and Benefits

The Administrator has the equitable power to order reinstatement, and indeed must order reinstatement for a layoff in violation of the Consent Decree. An integral part of the remedy of reinstatement is the ordering of full back pay up to the date of reinstatement. Back pay is not a claim for damages, but an integral part of the equitable remedy of injunctive reinstatement, and is viewed as an inextricable part of restoration to prior status. Harkness v. Sweeny Independent School District, 427 F2d. 319, 324 (5 Cir., 1970).

A back pay award is intended to make the employee whole. Bowe v. Colgate-Palmolive Co., 416 F2d., 711 (7 Cir., 1969). "Under both Title VII and 42 USC 1981 the injured workers must be restored to the economic position in which they would have been but for the discrimination -- their rightful place." Pettway v. American Cast Iron Pipe Co., 7 FEP 1115, 1147 (5 Cir., 1974). Once there is a determination that an economic injury has been suffered, back pay should be awarded absent any special circumstances. Pettway v. American Cast Iron Pipe Co., Id. at 1148. No such circumstances exist in the case of Mr. Foreman. Such special circumstances are applied only when there may be an unjust result, such as sex discrimination suits where conflicting state legislation, "which limit work hours or impose weight lifting limits or the like for women employees, require a violation of Title VII." Pettway v. American Cast Iron Pipe Co., at Id. at 1149, footnote 122.

Similarly, it has been held that back pay is to be awarded without regard to intent or good faith:

"Next it is argued that back pay should not be awarded in the absence of specific intent (good faith) to discriminate. A corollary argument is that the award was improper in light of the unsettled state of the law. The principal answer to both points is that back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss however benevolent the motives for its imposition." Robinson v. Lorillard, 3 FEP 653, 662 (4 Cir., 1971).

It is clear that, when a violation is found, reinstatement with full back pay to the date of reinstatement is the virtually mandatory remedy. We therefore respectfully request that Mr. Foreman be restored to his position as a lather on the Perinni job with full back pay, including lost fringe benefits (medical, pension, etc.), up to the date of reinstatement.

Very truly yours,

EMPLOYMENT LAW CLINICAL PROGRAM

By:

Gerald Dunbar
Gerald Dunbar, Esq.

David Raff, Of Counsel

cc: Walter Collieran, Esq.
Doran, Collieran, O'Hara, Pollio & Dunne
1140 Avenue of the Americas
New York, New York 10036

Jerry Siegal, Esq.
One St. Andrews Plaza
New York, N.Y. 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
 :
Plaintiff, :
 :
-against- :
 :
WOOD, WIRE AND METAL LATHERS :
INTERNATIONAL UNION, LOCAL NO. 46, :
 :
Defendant. :
 :
-----X

DECISION BY ADMINISTRATOR

On May 5, 1975, the undersigned convened an administrative hearing to take proof, inter alia, with respect to the layoff of David Lloyd Foreman, a member of a non-white minority and a Local 46 permit-holder, by the Perini Associates on December 13, 1974.

Mr. Foreman has been employed by Perini at the construction site of a Sewage Treatment Plant at the Hudson River and 135 Street, Manhattan for seven (7) months. According to his immediate supervisor, the permit-holder was terminated for "not working productively." His supervisor claimed that he constantly required instruction and specific orders from the supervisor, that when he was assigned with others to lift 30 foot steel rods he constantly positioned himself so that he would not be required to shoulder his share

of the load; and that he had been repeatedly warned of unsatisfactory performance.

On behalf of permit-holder Foreman, it is urged that (1) his termination was without just cause in violation of the Consent Decree in these proceedings and that the Union's conduct subsequent to the termination served to ratify the improper layoff.

On December 15, 1974 - two days after his discharge - Foreman went to the Union Hiring Hall and spoke to the Business Agent, who telephoned the job site to find out why Foreman had been terminated. This Union official reported that he learned "the guy wasn't pulling his weight." The following day, Business Agent McGovern visited the construction site to investigate further and confirmed the report he previously received.

At the hearing which I conducted, Business Agent McGovern, Supervisor Linner and permit-holder Peters testified with respect to quality of work and work attitude of Foreman. Foreman testified in his own behalf.

Past practice between the Union, Local 46, and Building and Construction contractors in the Metropolitan New York area appears to accept the right of Employers to establish the standard and quality of work, as well as the rate of productivity required of employees. The collective agreements between the Union and the several employer associations contain no requirement-customary in other industrial

collective bargaining contracts- that discipline or discharge be based upon just or proper cause. Nor does it appear that such agreements contain arbitration provision for review of the propriety of terminations.

However, Rule No. 7 of the Hiring Hall Rules and Regulations reserve to an employer the right to terminate for just cause. While the employers have not been made parties to the litigation nor to the Rules and Regulations, the explicit thrust of the "Rules" and specifically Rule No. 7 clearly imposes an obligation upon the Union to make reasonable inquiry within the context of each "termination" when so requested by a Local 46 member or permit-holder as a basis for determination whether there is just cause or good cause for the employer's act of termination.

According to Supervisor Linner, he had to correct Foreman's work on a number of occasions. But he also corrected the work of six or seven other men who were in his gang. Linner charged that Foreman refused to hold steel bars while Peters "burned" them. But there is no evidence when this occurred. Did it prompt the discharge, or did it occur months before? According to the record, Foreman worked at the Sewage Plant site for some seven months. Supervisor Linner testified that Foreman did not carry his burden of the load when lifting steel bars with other members of the gang. But there was no evidence whether - if such was the fact - that "soldiering on the job" made the work go slower;

made the work more dangerous; caused other workers to complain or quit. There was evidence of one accidental incident when another employee strained an arm. Is this sufficient in the circumstances to warrant termination? There was no claim that this was a deciding factor in the decision to terminate.

On the question before me I do not regard it as essential to determine whether the employer had just or good cause to terminate Mr. Foreman. The issue before me, as I see the problem, is whether the Union fulfilled its duty under the Hiring Hall Rules and Regulations to make its own inquiry - especially upon receiving a complaint from a permit-holder who is a non-white minority - to determine if just cause existed. As the transcript record discloses, this it did not do until the investigation in this proceeding in May 1975.

It needs no elaborate recital or emphasis from me that reasonable consideration for the learning time, adaptability and skill acquisition must be given by employers in the construction industry, their first-line supervisor and general foreman for those members of minority groups who enter the industry and seek employment within the jurisdiction of the Local 46 Hiring Hall under the protection of the Consent Decree in this litigation. A history of denial of economic opportunity is not obliterated, nor is the minority worker recompensed by a work assignment through the

Hiring Hall, if the Union passively tolerates an employer's exclusive judgment that a minority worker "was not working productively." The Union must show some aggressive, positive effort to secure the employer's cooperation towards the setting of standards that are reasonable within the context of specific work assignments and learning time span of those who have been historically, if not traditionally, barred from participating in such work.

To meet its duty, it seems reasonable that the Union require each employer to notify it in writing whenever a termination or discharge is made (1) because an employee is unsatisfactory, stating the basis for such dissatisfaction, such notice to be issued simultaneously with the termination; or (2) whenever an employee is laid off not in order of seniority as required by Rule 7 of the Hiring Hall Rules and Regulations.

Receipt of such notice should be followed up by a personal investigation of the facts of the situation by a Union Business Agent or other Union Representative, and one copy of the written report of such investigation, including the names of all employer representatives and witnesses interviewed, and including a copy of the employer's termination notice should be mailed to the terminated employee, and one copy to the Administrator.

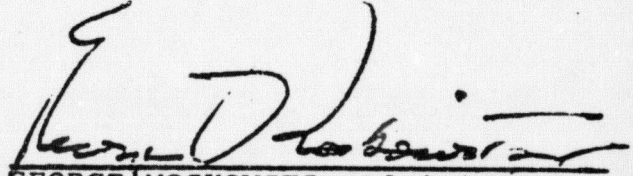
In the circumstances of the matter before me, I conclude that the Union did not aggressively fulfill its obligation under Rule 7 of the Hiring Hall Rules and

Regulations to ascertain - at the time of the Foreman termination - whether Perini Associates had just cause to terminate Foreman, and would have made no further inquiry than it did on December 15 and 16, 1974 had the Administrator not conducted this inquiry in May, 1975.

Supervisor Linner testified that the work of the Sewage Treatment Plant which was being performed by the gang of which Foreman was a member was going slow and would have continued for another month. In my judgment the Union had a duty to consciously and conscientiously attempt to seek employer's review and reassessment of Foreman's job performance and to suggest or recommend some measure of corrective action short of termination. Since the Union did not do this, it is my judgment that David Lloyd Foreman should be made whole for the lost opportunity to work another month on the job. I therefore direct the Union to pay David Lloyd Foreman as damages, a sum equal to the average of four (4) weeks wages.

I direct that such payment be made within ten (10) days from the issuance of this Administrative decision, unless, in view of this "Administrator's Directive" involving monetary damages or the "Directive" to the Union with respect to "notification and investigation" of terminations I have prescribed in this Decision, the Union advises me that it intends to seek review of this Decision.

Dated: New York, New York
September 25, 1975


GEORGE NOSKOWITZ, Administrator

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

Plaintiff,

: 68 Civ. 2116

-against-

WOOD, WIRE AND METAL LATHERS
INTERNATIONAL UNION, LOCAL NO. 46,

: MOTION FOR

: RECONSIDERATION

Defendant. :
-----X

SIR:

PLEASE TAKE NOTICE that on October 29, 1975 at 4:30 p.m. at 540 Madison Ave., New York, the undersigned herewith cross moves for reconsideration of the Decision by Administrator dated September 25, 1975 in which the Union is directed to pay David Lloyd Foreman as damages, a sum equal to the average of four (4) weeks wages and in which the Union is further directed to put into effect a procedure for the notification and investigation of terminations of employment.

Dated: New York, N.Y.

Yours, etc.

GERALD DUNBAR, ESQ.
Employment Law Clinical Program
49-51 Chambers Street, Suite 220
New York, N.Y. 10007

By

Gerald Dunbar, Esq.

TO: GEORGE MOSKOWITZ, ESQ.
540 Madison Avenue
New York, N.Y. 10022

JERRY L. SIEGEL, ESQ.
Assistant U.S. Attorney
One St. Andrews Plaza
New York, N.Y. 10007

DORAN, COLLERAN, O'HARA, POLLIO & DUNNE, P.C.
Attorneys for Metal Lathers
1140 Avenue of the Americas
New York, N.Y. 10036

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
UNITED STATES OF AMERICA,
:
Plaintiff,
:
-against- 68 Civ. 2116
:
WOOD, WIRE AND METAL LATHERS INTER-
NATIONAL UNION, LOCAL NO. 46, AFFIRMATION
:
Defendant.
:
-----X

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.: -

GERALD J. DUNBAR, pursuant to C.P.L.R. 2106 does hereby affirm the following to be true under the penalties of perjury:

1. I am the attorney for David Foreman and am familiar with the facts of this action.
2. This affidavit is submitted in opposition to the defendants application for reconsideration and in support of grievant Foreman's cross application for reconsideration.
3. The grievant requests reconsideration because the determination that David Foreman be limited to four weeks back pay and denied reinstatement is unreasonable on the facts and the law.

4. The Administrator in his decision of September 25, 1975 had before him the issue of damages to Mr. Foreman. The Administrator relied upon Mr. Linner's statement that work in the cofferdam would continue another month (transcript page 43) and interpreted this to mean that at the end of this phase of the job the entire work gang would have been laid off, thus terminating Mr. Foreman's potential work opportunity. In light of the facts hereinafter submitted the conclusion of fact by the Administrator is unreasonable on its face.

5. The data herein, found in tabular form in Appendix A, is the weekly workforce breakdown as submitted by the employer to the New York City Bureau of Labor Services in accordance with the employers affirmative action obligations. This data shows a work force that has been remarkably numerically stable for the entire period from Mr. Foreman's discharge to the present time.

6. The data herein, found in tabular form in Appendix B, is the employer's breakdown of lathers by name and race as employed on January 24, 1975 and September 22, 1975. This data clearly discloses that of the seventy (70) lathers working on January 24, 1975 sixty-two of the same individuals were still employed on September 22, 1975. The eight lathers not still employed on September 22, 1975 were in fact replaced with eighteen new individuals thus increasing rather than decreasing the work force over this period. The fact of personnel stability as well as numerical stability in the work force is clear evidence of the fact that sub-

stantial lather work continued well beyond the four week period for which Mr. Foreman was granted back pay. We would submit that there was no cessation of lathering work, that Mr. Foreman would not have been laid off in four weeks and that the lawyers should, therefore, run from the date of layoff to the date when he is reinstated.

7. In opposition to defendant Local 46 Wood, Wire and Metal Lathers Union motion for reconsideration, the grievant David Foreman submits that the issue in this case was whether the union fulfilled its obligation as set forth under the consent decree to make a reasonable inquiry when requested to do so by the permit-holder as to whether there was just cause for Mr. Foreman's lay-off. The Administrator rightly found that the perfunctory investigation conducted by the unions business agent, Mr. McGovern, upon Mr. Foreman's request, was not a reasonable inquiry and not in keeping with the concept of "just cause," especially as to a complaint by a non-white worker. The Administrator rightly concluded that a proper investigation would have been one where the union conscientiously sought review and re-assessment of Mr. Foreman's job performance and this the union certainly did not do. The fact that the Administrator has taken the opportunity in this decision to set forth specific guidelines and standards for future terminations is not in any way relevant to the findings in the instant case. The thrust of Rule 7 is to impose an obligation on the union to make an aggressive inquiry into each termination when requested to do so by the union member or permit holder. These guidelines

set forth her do not in any way affect the fact that the union did not act in good faith under the consent decree to represent Mr. Foreman.

8. The union in its motion for reconsideration cites Vaca v. Sipes, 385 U.S. 895, 64 LRRM 2369, contending that the grievant can only recover from the union if he can show arbitrary or bad faith conduct in processing his grievance under the collective bargaining agreement and that in this case there is no grievance procedure or arbitration remedy. We contend that this case is not in point as this grievance is under the consent decree and not a collective bargaining agreement. Even under the Vaca standard the union would be held liable for the acts of omission by its business agent McGovern. Mr. McGovern stated that he had a double standard of investigation, one for permit-holders who seek redress and higher standard when the Administrator makes inquiry (transcript p. 66). Clearly the statement that, "When he (Mr. Moskowitz) calls me up, then I really do it" (p.66) evidences a mere perfunctory inquiry on all other occasions.

The "inquiry" made in Mr. Foreman's behalf was to call the person who fired Mr. Foreman and not make an independent inquiry (p.60). Any alledged further investigation was clearly made without the grievant having any knowledge of the investigation and no reason to suspect its existence, as well as no knowledge of its outcome (p.67). Mr. McGovern failed in any way to communicate the results of his so

called inquiry to the grievant (p.26). Mr. McGovern fails to see he has any duty at all to Mr. Foreman (p.62,65) and characterized his view of his duty by saying: "I mean a layoff isn't the end of the world" (p.63). With this callous attitude, especially in a period of high unemployment in the construction trades, it is obvious that Mr. McGovern has no first hand knowledge of what a lay-off means to a man or his family.

In the cases following Vaca, the above factual setting is indeed a breach of the union's duty of fair representation. Mere arbitrary conduct by the union, in the absence of specific bad faith, is a breach of the duty of fair representation in a line of cases representing at least four Circuits. Beriault v. Warehouseman's Union, 501 F. 2d 258, 87 LRRM 2070 (9th Cir., 1974); Sanderson v. Ford Motor Co. 483 F. 2d 102, 110, 83 LRRM 2859 (5th Cir. 1973); Woods v. North American Rockwell Corp., 480 F. 2d 644, 648, 6 F.E.P. Cases 22 (10th Cir. 1973); Griffin v. United Auto Workers, 469 F. 2d 181, 183, 81 LRRM 2485 (4th Cir. 1972). In the Sixth Circuit mere negligence in the absence of any wilful inaction is a breach of the duty of fair representation Ruzicka v. General Motors and United Auto Workers, B.N.A., Daily Labor Report No. 189, D-1, September 29, 1975. In our own Second Circuit, in an analogous case under the Railway Labor Act, an unintentioned failure by a union to prosecute a timely appeal on behalf of a union member discharged from employment constituted a breach of the union's duty of fair representation. Schum v. South Buffalo Railway, 496 F. 2d

328, (2nd Cir., 1974). It is clear that under either standard, arbitrariness or mere negligence, that the union breached its duty of fair representation to Mr. Foreman.

9. In light of all the points raised herein David Foreman requests the Administrator to reaffirm his finding against the defendant and to reconsider his award of damages. Upon reconsideration, we respectfully submit that the award of back pay run from the day of discharge to the day of reinstatement.


GERALD J. DUNBAR, Esq.

Dated: New York, New York
October 27, 1975

APPENDIX A

Lather Work Force at North River

	<u>Total</u>	<u>Foreman</u>	<u>J/M</u>	<u>Minorities</u>
12/6/74	80	9	70	10
12/13/74	80	8	71	10
12/20/74	78	8	69	7
1/3/75	73	8	64	7
1/10/75	72	8	63	8
1/17/75	72	8	63	8
1/24/75	70	8	61	8
1/31/75	70	8	61	8
2/7/75	71	8	62	8
2/14/75	70	8	61	8
2/21/75	71	8	62	8
2/28/75	73	8	64	8
3/7/75	77	8	66	8
3/14/75	80	9	68	10
3/21/75	80	9	68	10
3/28/75	81	9	67	10
4/4/75	86	9	71	12
4/11/75	88	9	73	13
4/18/75	88	9	73	13
4/25/75	88	9	73	13
5/2/75	91	10	75	13
5/9/75	94	10	78	15
5/16/75	95	10	79	15

	<u>Total</u>	<u>Foreman</u>	<u>J/M</u>	<u>Minorities</u>
5/23/75	84	10	68	13
5/30/75	84	10	68	13
6/6/75	84	10	68	13
6/13/75	84	10	68	13
6/20/75	82	10	66	13
6/27/75	82	10	66	13
6/30/75	76	10	60	13
7/4/75				
7/11/75				
7/18/75				
7/21/75				
8/1/75	69	8	57	-
8/8/75	78	9	63	12
8/15/75	79	10	63	13
8/28/75	79	10	63	13
8/29/75	80	10	64	13
9/5/75	80	10	64	12
9/12/75	79	10	63	12
9/19/75	78	10	62	12
9/26/75	78	10	62	12
10/3/75	78	10	62	-

Strike in industry

APPENDIX BLOCAL 46 LATHERS

1 - White
2 - Black
3 - Spanish Surname

<u>NAME</u>	<u>Worked - 1/24/75</u>	<u>Worked - 9/22/75</u>	<u>MINORITY Grouping</u>
ABEL M.C.	X	X	1
BOLTON, J.F.	X	X	2
BRAY, G.	X	X	1
BRIDGES, M.	X	X	2
CARBONELL E.	X	X	5
CARECCIA, N.M.	X	X	5
CARROLL T.F.	X	X	1
CHRISTMAN J.E.	X	X	1
CONNELLY F.S.	X	X	1
CONNELLY J.T.	X	X	1
CORCORAN R.	X	X	1
CROAKE W.G.	X	X	1
DARLING C.	-	X	2
DONEGAN T.E.	x	x	1
DONOHUE, P.H.	x	-	1
DUGGINS, R.M.	x	x	2
DUNLAY F.J.	x	x	1
EVANS T.A.	x	x	2
EVANS, T.J.	-	x	2
FITZGERALD, J.	-	x	1
FRANK E.J.	x	x	1
FREEMAN H.J.	-	x	1
FULLER, R.A.	x	X	1
GILL S.J.	x	x	1
GUZMAN, I.	-	x	5
HOHS H.	x	x	1

<u>NAME</u>	<u>Worked - 1/24/75</u>	<u>Worked - 9/22/75</u>	<u>MINORITY Grouping</u>
HUBBARD F.T.	-	x	2
HUGGINS J.	-	x	2
HUNT T.J.	x	x	1
JACKSON R.J.	x	x	1
JENNINGS, T.M.	x	x	1
JONES R.W.	x	x	1
KEHOE F.M.	-	x	1
KELLY J.B.	x	x	1
KING, J.M.	-	x	1
KING, P.J.	x	x	1
KNIGHT, G.	x	x	2
KRUCKEL E.L.	x	x	1
LANGAN, R.W.	x	-	1
LAWLER H.J.	x	x	1
LEAHEY, J.W.	x	x	1
LEDWITH, R.A.	x	x	1
LEWIS W.J.	x	x	2
LINDENAU, G.	x	x	1
LINNER J.	x	x	1
LONG, J.J.	x	x	1
MABRY, C.	-	x	2
MAHONEY J.T.	x	x	1
MCCAULEY V.D.	x	x	1
McGovern B.F.	x	x	1
McKAY, J.F.	-	x	1
McKEAN, W.	x	x	1
McKENZIE, L.	x	x	2
MELCHERTS, E.	x	x	2

<u>NAME</u>	<u>Worked - 1/24/75</u>	<u>Worked - 9/22/75</u>	<u>MINORITY Grouping</u>
MELVIN W.A.	x	x	1
MONTELEONE J.A.	x	-	1
MOONEY E.R.	x	x	1
MOORE J.R.	x	-	1
MOTEN E.J.	-	x	1
MURRAY J.	x	x	1
OLECHNOWICZ A.P.	x	x	1
PASQUA O.	x	-	1
PISANIELLO F.A.	x	-	1
PYNE, J.J.	x	x	1
RICHARDSON J.D.	x	-	1
RIDINGS T.R.	-	x	1
RYAN J.A.	-	x	1
RYAN W.J.	x	x	1
SAMUELS E.	x	-	2
SCANLON L.T.	x	x	1
SCHMITT M.J.	x	x	1
SHURINA S.J.	x	x	1
SIMON F.	-	x	1
STEPHENS J.J.	-	x	1
SULLIVAN B.J.	x	x	1
TELEISHA R.	x	x	1
VAUGHAN, T.	x	x	1
VAUGHAN, T.J.	x	x	1
WALSH, J.J.	x	x	1
WARNOCK T.A.	x	x	1
WARNOCK T.P.	x	x	1
WEBB, J.J.	-	x	1
WILLIAMS, F.P.	-	x	1

091

<u>NAME</u>	<u>Worked - 1/24/75</u>	<u>Worked - 9/22/75</u>	<u>MINORITY Grouping</u>
WILLIAMS J.J.....	x	x	1
WILLIS C.P.	x	x	1
WOLTERING J.	x	x	1
WOLTERING R.A.....	x	x	1
ZAMOR J.	x	x	2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,	:	
	:	68 Civ.2116
Plaintiff,	:	
	:	
-against-	:	
	:	
WOOD, WIRE AND METAL LATHERS	:	
INTERNATIONAL UNION, LOCAL NO.46,	:	
	:	
Defendant.	:	

-----X

DECISION BY ADMINISTRATOR
ON
MOTIONS FOR RECONSIDERATION

The undersigned, as Administrator, previously issued a decision after an administrative hearing in which proof was offered and received "with respect to the layoff of David Lloyd Foreman, a member of a non-white minority and a Local 46 permit-holder, by the Perini Associates on December 13, 1974.". In the interests of precision and facility of reference, a copy of that decision is annexed hereto.

To the extent that some paraphrasing of language of that decision may find its way into the discussion and consideration of the within motions, it is nevertheless the purpose of the undersigned that the structure and language of the original decision shall prevail as the expression of my thoughts and conclusions.

In the "Foreman" proceeding, it was urged on behalf of David Lloyd Foreman that (1) his termination was without just cause in violation of the Consent Decree in these proceedings and that the Union's conduct subsequent to the termination served to ratify the improper layoff.

After the "Foreman" hearing to which I have alluded above, and after a careful examination of the stenographic transcript thereof, the Administrator determined that the issue at bar was whether the Union fulfilled its duty under the Hiring Hall Rules and Regulations to make an inquiry when it received a complaint of termination, discharge or layoff from a Local 46 permit-holder, especially one who is a member of a non-white minority, to determine if just cause existed for such termination, discharge or layoff. Having then determined that the Consent Decree and the "Local 46 - Rules and Procedures for Operation of Hiring Hall" confirmed by the United States District Court on July 16, 1971 imposed

upon the Union the duty to make proper inquiry and determination, the Administrator concluded that the Union, in the circumstances disclosed by the evidence in the "Foreman" hearing, failed in its obligations under the Consent Decree and the Hiring Hall Rules and Regulations, specifically "Rule VII Layoffs". The cited rule provides:

"No workman shall be laid off until all workmen at his job performing the same class of work who commenced work subsequent to him have been laid off. Nothing in this paragraph shall derogate from the right of an employer to layoff workmen for cause. Any workman who challenges the basis of his layoff shall notify the Administrator in writing within three (3) days of such layoff, setting forth his reasons for regarding the layoff as improper. The workman shall simultaneously send copies to the Union and his employer."

By way of remedy, the Administrator directed the Union to pay to permit-holder Foreman a sum equal to the average of four (4) weeks wages based upon a calculation set forth in that decision, and further directed the Union to institute certain procedures for notification, investigation and preservation of the product of its investigatory inquiry in cases of worker complaint of termination or layoff.

THE MOTIONS FOR RECONSIDERATION

I. The Union's request for reconsideration charges (a) that the remedy of four (4) weeks pay to permit-holder Foreman is "unreasonable, unfair and unjust" and (b) that the procedure prescribed for notification and investigation is unworkable and in derogation of the Court's memorandum of July 16, 1971.

The Union suggests no alternative to the procedures set forth in the decision; but merely suggests a meeting to discuss revision of the Hiring Hall Rules and Regulations. The Union argues that it has no way of requiring an employer to comply with the procedures I have outlined. But implicit in the last sentence of "Rule VII" is the reasonable and practical expectation that an employer will, upon receipt of a written notification from an employee - or the Union on his behalf - respond with equal solemnity by a written response based upon its own investigation.

Futhermore, while the Union's argument that it has no control over a supervisor or foreman who is performing his duties as a management representative appears to have a sound superficial basis, it is, in my judgment, not consistent with the historic or realistic relationship between the Union and the industry. Foremen are members of Local 46;

their membership, union loyalty, union obligations and other perquisites of membership are not placed in suspension or "blind trust" during any period of service as foreman or supervisor. This is implicit, if not self-evident in the structure and obligations set forth in the Hiring Hall Rules and Regulations.

See: Rule III which requires an employer to accept as employees only those who appear at the job site with a properly issued "Contractor's Sheet". Rule III explicitly provides for the designation of an employee referred from the Hiring Hall as "Foreman" or "Deputy Foreman". It is frequent if not universal practice that the first man assigned to a job site is designated as foreman.

See: Rule V which imposes on the employer - through the foreman - the duty to distribute overtime equally.

See: Rule VII which requires the employer - through the foreman - to maintain certain records with respect to transfers.

I find it unreasonable and without merit in the circumstances before me to contend that it is beyond the contractual power of the Union, and beyond the purview of the Union's decretal obligations to comply with the procedures I have outlined and to which it objects.

I have given due consideration to the contentions raised by Local 46 in its Motions for reconsideration. Upon such reconsideration, I nevertheless adhere to my original decision.

II. On behalf of Mr. Foreman, a request has been made for reconsideration of so much of the original decision as limited Mr. Foreman to a sum equal to the average of four (4) weeks wages to be paid by the Union as damages. As the original decision disclosed, the Administrator relied upon the testimony of Mr. Foreman's supervisor that the work of the gang to which Mr. Foreman was attached would have phased out in another month.

Mr. Foreman's counsel, Gerald Dunbar, Esq., acting through and on behalf of the "Employment Law Clinical Program" has since tabulated weekly workforce figures submitted by Perini Associates to the New York City Bureau of Labor Services in accordance with its affirmative action obligations as an employer. Counsel asserts that those weekly workforce figures disclose "a work force that has been remarkably numerically stable for the entire period from Mr. Foreman's discharge to the present time.", and that "substantial lather work continued well beyond the four week period for which Mr. Foreman was granted back pay."

Counsel for the terminated employee requests that the remedy be revised or amended to provide for damages equivalent to weekly wages running from the date of layoff to the date of reinstatement.

While it appears presumptively from the tabulations annexed as exhibits that lather work in fact existed and continued beyond the one month testified to, I believe that due process and the merits of the issue will be better served by a hearing to examine the accuracy and reliability of the tabulations, granting to the Union an opportunity to challenge the tabulations and the conclusion based thereon.

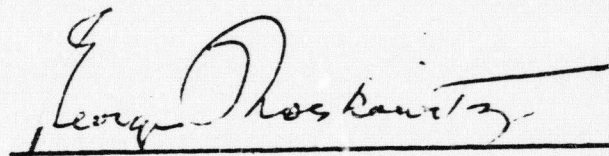
I therefore direct the parties to appear at a further hearing in this matter on a date to be scheduled by my office for the presentation of such testimony and other evidence as may be related but limited to the period of time that lather work continued to be performed at the Sewage Treatment Plant construction site at the Hudson River at 135th Street, Manhattan after the layoff of David Lloyd Foreman on December 13, 1974; the number of lathers so employed from December 13, 1974 forward; the turn-over and replacement of lathers, if any, from December 13, 1974 forward; the nature of the work performed by lathers from December 13, 1974 forward; and such other evidence as may be relevant but limited to the right of continued employment of Mr. Foreman

at the aforesaid job site after December 13, 1974, if any.

Pending such hearing and determination, the Union is nevertheless directed to comply with each of the terms and directions contained in my original decision.

Dated: New York, New York

January 20, 1976

A handwritten signature in cursive script, reading "George Moskowitz", is written over a horizontal line.

GEORGE MOSKOWITZ, Administrator

ADMINISTRATIVE HEARING

-----X
In the Matter of :
METAL LATHERS UNION, Local 46 :
RE: DAVID LLOYD FOREMAN :
Claim for Wages Lost :
-----X

New York Sheraton Hotel
7th Avenue and 56th Street
New York, New York

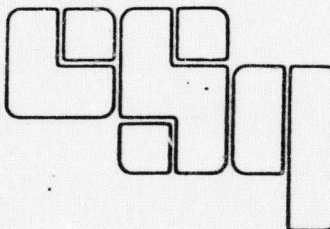
March 4, 1976
1:30 p.m.

GEORGE MOSKOWITZ,

Administrator.

Paul Fromm, C.S.R.
Division

Esquire
Reporting
Company
Inc.



41 East 42 St.
New York
10017
New York
212 687-8010

pm

1

2 APPEARANCES:

3

4

WALTER M. COLLERAN, ESQ.,
Attorney for the union
1140 Avenue of the Americas
New York, New York 10036

6

7

8

DAVID RAFF, ESQ. and GERALD DUNBAR, ESQ.
U. S. Attorneys Office
One St. Andrews Place
New York, New York 10007

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1

2

THE ADMINISTRATOR: Let the record

3

show that this is a continuation of the David

4

Lloyd Foreman matter in connection with the wage

5

claim proof which Mr. Foreman's lawyers ask leave

6

to submit another motion for reconsideration,

7

which is granted.

8

I assume everybody who is here, is here

9

in connection with that matter. There are some

10

ladies down there that I don't know, but I assume

11

they are students who are sitting in with their

12

professors.

13

(Introduction is made.)

14

THE ADMINISTRATOR: Mr. Dunbar, may we

15

go forward? Is Mr. Dunbar going to present --

16

MR. DUNBAR: Mr. Raff is going to give an

17

opening statement and then I will present the case.

18

MR. RAFF: We are prepared to establish a

19

prima facie case based upon information supplied

20

by the employer that the work at the site

21

continued well beyond the four-week period given

22

by Mr. Linner in a previous hearing on this matter

23

and that in fact substantial work for lathers

24

continued to this date.

25

We will further show that rather than

1
2 laying people off the work force actually increased
3 in number from the time of Mr. Foreman's improper
4 layoff to date.

5 The business record and statistics compiled
6 from them will clearly show Mr. Linner's testi-
7 mony to have been wholly incorrect and as a
8 consequence the discipline information should
9 now fully discount Mr. Linner's statements,
10 which taken together with Mr. Colleran's question
11 regarding the "imminent reduction in force" gave
12 the impression that there was only one month's
13 lathing work left at the time of Mr. Foreman's
14 termination and, consequently, the reliance
15 upon that exchange limited Mr. Foreman's damages
16 to only four weeks of back pay equivalent.

17 In actual fact, Mr. Foreman's damages
18 should have been calculated from the time of
19 improper termination to the date of reasons state-
20 ment as originally requested by Mr. Foreman.

21 We are requesting that the Administrator
22 not correct his original decision to reflect the
23 actual and real damages suffered by Mr. Foreman --

24 THE ADMINISTRATOR: You don't mean
25 correct.

10

1
2 MR. RAFF: Amended. And the original
3 determination that there was only four weeks
4 of work.

5 THE ADMINISTRATOR: I don't take the
6 position that I was incorrect at the time.

7 MR. RAFF: Amended, and that such damages be
8 calculated at the rate of full back pay inclusive
9 of all fringe benefits or money equivalent from
10 the date of previous aware until the date of
11 reason statement.

12 Additionally, such damages should include
13 interest at six per cent computed quarterly and
14 they should include a cost of living adjustment
15 to insure that Mr. Foreman is made whole with
16 1976 dollars.

17 I have nothing further.

18 MR. COLLERAN: Can I get that last
19 statement back?

20 MR. RAFF: That there be a cost of living
21 adjustment in the award.

22 THE ADMINISTRATOR: Thank you, Mr. Raff.

23 MR. DUNBAR: Our first witness is
24 Miss Ligia Elias.
25

L I G I A E L I A S , called as a
witness, having been first duly sworn by the
Administrator, testified as follows:

DIRECT EXAMINATION

BY MR. DUNBAR:

Q Where are you employed?

A I am employed with the Bureau of Labor
Services, Office of Contract Compliance.Q What is the function of the Office of
Contract Compliance?A To monitor contractor work forces on all
City construction sites and any private work they have
ongoing during the period of the City contract.

Q Is this pursuant to any legal authority?

A This is pursuant to Executive Order 71
and Rules and Regulations promulgated therefor.Q I show you these two. Is this Executive
Order 71 and its amended Rules and Regulations?

A Right.

MR. DUNBAR: This is Exhibit A
for Mr. Foreman.(Executive Order 71 with amended
Rules and Regulations, received in evidence

1
2 as Foreman Exhibit A, as of this date.)

3 BY MR. COLLERAN:

4 Q Where in Executive Order 71 is the record
5 keeping function of your office?

6 A It's located in Section 3, Page 4 in the
7 Rules and Regulations.

8 Q Pursuant to your record keeping responsi-
9 bilities with regard to the North River Pollution
10 Control Project, do you receive forms similar to this
11 on a weekly basis from the employer?

12 A I receive those on the third or fourth day
13 of every week from Perini Associates.

14 Q Is that an original as sent to you by Perini
15 and received this morning?

16 A This is the original received this morning.

17 Q Do you enter those records in a file?

18 A After ~~writing~~ ^{filling in} them they are submitted to
19 the project file.

20 Q Did you go through all of the employer's
21 weekly work force records and cull out a total number
22 of lathers, both journeymen, foremen and non-whites?

23 A I did.

24 Q For a period from December 6, 1974 until
25 last week?

1

2

A I did.

3

Q Is this an accurate summary of your findings?

4

A This is a summary that I did, personally.

5

MR. DUNBAR: We would like to introduce
that as Exhibit B.

6

7

8

9

10

11

MR. COLLERAN: I am going to object to the
introduction of this exhibit in evidence, because
it contains material far beyond the time when the
matter was presented to the Administrator for the
hearing.

12

13

14

15

The original hearing in this case was held
on May 5, 1975, and this material contained in
this particular Appendix A goes for periods
subsequent to that time of the hearing.

16

17

18

For that reason the material is not relevant
to this proceeding and should not be received
in evidence.

19

20

21

22

23

24

25

MR. DUNBAR: We feel that this information
is relevant. On your decision after the May hearing
you found that all things being equal, Mr. Foreman
should not have been laid off or at least his
complaint should have been followed up more vigorously
by the union, and as a consequence you awarded him
one month's back pay in the belief that what Mr.

1
2 Linner had testified to was a true fact, that is
3 Mr. Foreman's potential work opportunity ended at
4 the end of one month.

5 We believe this information is extremely
6 relevant to show that Mr. Foreman's work oppor-
7 tunity would never have ended up until now and even
8 now his work opportunity would have diminished.

9 And it is relevant to our demand that he
10 be awarded full back pay until the day he is
11 reinstated.

12 THE ADMINISTRATOR: I will take it. I
13 will take it as Foreman Exhibit B.

14 (Summary of findings, received
15 in evidence as Foreman Exhibit B, as of this
16 date.)

17 BY MR. DUNBAR:

18 Q Pursuant to your statutory responsibilities
19 to gather information on contractors' work sites, did you
20 have occasion to gather information as to the names
21 of the individual lathers on the Perini work site?

22 A I did.

23 Q Was this form submitted to you by the
24 employer and the employer asserted that that was a true
25 record of those who were employed by Perini at that date?

1

2

A It was.

3

MR. DUNBAR: That we would like entered
as Exhibit C.

5

6

7

THE ADMINISTRATOR: I take it that this
is a list of lathers on the job as of December
16, '74.

8

9

MR. DUNBAR: Right. I will try and explain
that momentarily.

10

11

12

MR. COLLERAN: May I see the exhibit
before it goes in? I should have a chance to
look at it.

13

14

15

THE ADMINISTRATOR: I assumed that as
with the prior exhibit, you had been tendered
a copy.

16

I apologize.

17

18

MR. COLLERAN: I have no objection
to that.

19

20

21

22

23

24

BY MR. DUNBAR:

25

Q

I would like you to identify this, Miss Elias.

2 A This is the survey of the lathers who were
3 working on the Perini site starting in '74, I believe it is.

4 Q Is this list actually a compilation of
5 four of these payroll reports from the employer over
6 various periods of time?

7 A Yes, it is.

x 8 Q As well as a rationale identification?

9 A Yes. This information was taken from the
10 files.

11 THE ADMINISTRATOR: What is the purpose
12 of this exhibit?

13 MR. DUNBAR: This exhibit will show
14 continuity of the work force. Each individual
15 who has been employed by Perini from the 1st of
16 the year of '75 until the present day is so noted
17 when they were on the work force.

18 And it is designed to show that there has
19 been work force continuity in individuals just as
20 the previous exhibit was designed to show that
21 there was work force continuity in numbers.

22 THE ADMINISTRATOR: Do I understand --
23 I am just doing this in order to get to the
24 heart of this as quickly as possible.

25 Mr. Colleran, if you object, I will refrain.

1
2 MR. COLLERAN: I can't object until I
3 hear what you have to say.

4 THE ADMINISTRATOR: I note from Exhibit
5 B, Mr. Dunbar, that there was a strike in the
6 City in July of '75, from the week ending or after
7 the week ending June 30, '75 until August 1,
8 1975.

9 Will we have any proof which will relate
10 to the resumption of lathing work?

11 I ask that question because I have, in the
12 exhibit which you now offer, it appears to
13 reflect those named employees who were on the
14 job in January of '75 and those who were on
15 the job beginning September 22, 1975.

16 I don't know, therefore, what happened
17 after the end of the strike unless you are going
18 to offer some proof that lathers didn't resume
19 work until September 22nd.

20 MR. DUNBAR: I believe that Exhibit B
21 which we submitted, this exhibit, shows that on the
22 1st of August, lathing work began, or the week
23 of the 1st of August lathing work began on the
24 site.

25 I will call a witness who I think can

1

2

testify to the exact --

3

4

5

MR. COLLERAN: I know what happened in the industry. There was a strike by the engineers that the job was --

6

7

THE ADMINISTRATOR: I want to know who came back.

8

9

10

11

MR. COLLERAN: He has some figures, I understand, indicating some people came back. I am not going to object. I know there was a strike.

12

13

THE ADMINISTRATOR: Do you have any objection as to this proposed exhibit?

14

15

MR. COLLERAN: I would like some voir dire.

16

17

VOIR DIRE EXAMINATION

18

BY MR. COLLERAN:

19

Q

Miss Elias, did you prepare this sheet?

20

A

Yes, I did.

21

Q

Is this something that you do in the normal course of business or did you do this for this particular case?

22

23

24

A

I do it when there is a question on the particular contract in reference to specific trades.

25

1

2

Q You didn't answer my question.

3

4

Did you prepare this in connection with
the North River Perini job?

5

A Yes, I did.

6

Q Is that a normal type of compilation you

7

would make?

8

A When necessary.

9

Q What do you mean?

10

A Depending on the violation that the contractor

11

has at that point or if there is a question by anyone

12

in the office who deals with the particular contract.

13

Q You are talking about the contractor's job

14

generally and there are a number of minorities working

15

on the job?

16

A If there is a specific question in reference

17

to a specific trade, then it's done for that trade alone.

18

Q Who asked you to prepare this report?

19

A My supervisor.

20

Q When was it prepared?

21

A It was prepared like the middle of February,

22

I believe. Yes.

23

Q Did she tell you why it was to be prepared?

24

A Mr. Dunbar had responsibility to my super-

25

visor and he requested that I do it.

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Q

A

Q

A

Q

A

Q

A

Q

A

Q

A

Q

A

Q

A

So it was prepared specifically for this case, then, that is what you are telling me?

I assume so.

Was there any complaint pending against the employer at the time this was prepared?

Yes, there was.

By whom?

By our office. There was a violation on the lathers and a formal hearing was issued, I believe it was February 25th, if I am not mistaken.

Was there any complaint pending by Mr. Foreman against the company?

At that point, I don't know.

So this document, then, was prepared at Mr. Dunbar's request?

Yes, it was.

Can you tell me why you used the dates which you did?

He requested that I use those particular dates.

He gave you the dates?

Yes. He asked me to use certain periods and that is what I did.

And you didn't know the basis for it, really?

No, I did not.

1
2 this with a statement as to its applicability
3 to the report you could ask us for.

4 I believe that this Exhibit D presumtively
5 shows that if a person was working in January of
6 '75, and again the same person was working in
7 September of '75, that that person was in fact
8 rehired on or about August 1st or was brought
9 back August 1st after a strike.

10 Your attention is drawn to the first
11 column which I think is the most relevant.
12 Nearly every person before whose name there appears
13 an X, were those working when David Lloyd Foreman
14 was working, nearly every single one of those was
15 working on 2/2/76.

16 The column, the first column where there
17 are no X's means the person was not employed
18 on 1/24/75. Most of those people later joined
19 the job.

20 However, the vast majority of people who
21 were working on the 24th of January, '75, are still
22 on the job.

23 That is the graverman of our evidence, the
24 thrust of our evidence that those people who
25 were on the job are still there today, and but

1
2 for the layoff, Mr. Foreman would have been
3 there still today, that there was no work force
4 layoff.

5 MR. COLLERAN: If that is the basis for
6 using this then I am going to object because the
7 exhibit shows people working on the work force in
8 January 24, '75 and Mr. Foreman was laid off
9 December 13, 1974.

10 So there is no record here showing who was
11 on the job at the time Mr. Foreman was on the
12 job and who came after Mr. Foreman or who was laid
13 off prior to this thing, if there were layoffs,
14 which there were.

15 MR. DUNBAR: In answer to that, the
16 Administrator has already awarded Mr. Foreman
17 four weeks in damages. If we take the four
18 weeks from Mr. Foreman's layoff date, it's over
19 approximately 1/24/75. And anyone who was still
20 working at that time, if they continued to work,
21 that they would have been in the same class as
22 Mr. Foreman.

23 MR. COLLERAN: But it doesn't show people
24 who were laid off after Foreman was laid off and
25 prior to January 24, '75.

1
2 MR. DUNBAR: I believe the Administrator
3 has already decided that Mr. Foreman's work
4 opportunity continued until approximately
5 1/24/75 and that only the period thereafter is
6 at issue in this hearing.

7 THE ADMINISTRATOR: Am I to go on the
8 assumption that people who were at work on January
9 24, '75, as this exhibit seems to indicate, were
10 employees who were working, A, at the time that
11 Mr. Foreman was laid off on December 13, 1974?

12 And you have some names here, for example,
13 Beysel, Bosco, Curran, Duffy, were not working
14 on January 24, '75.

15 I don't know whether they are listed
16 because they are on the most recent payroll
17 which the City used to compile this or whether they
18 were on periods of layoff and recall.

19 In other words, were they working at the
20 time that Mr. Foreman was laid off in December of
21 '74?

22 MR. DUNBAR: If you wish, I do have a payroll
23 runoff for 12/16/74, which I did not enter at this
24 time because I didn't feel it was relevant.

25 If the Administrator wishes, we can make

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

an additional submission at a later date.

MR. COLLERAN: I would like to know this.
For example, you have a man down here named Curran.
It doesn't appear he is even on the job.

THE ADMINISTRATOR: What inference am I
to draw from the presence of Mr. Curran's name
on the list? Am I to draw the inference that
he was on the payroll as of a date which was the
last time that Mr. Foreman was on the payroll?

MR. DUNBAR: This is an original work
sheet for this. Just in answer to that specific
question, Mr. Curran was on the job as of 12/16/74.
We have no further record of him beyond that
on the job.

MR. COLLERAN: That means he probably
was laid off before January 24, '75. He doesn't
show up on January 24, '75. Wouldn't that be so?

MR. DUNBAR: I think that is a reasonable
inference. I don't know, he may have quit, but
he was not on the job.

THE ADMINISTRATOR: Maybe I can short
circuit this.

MR. COLLERAN: What about some of the
others? You have Johnson, Healey, no X's

1

2

alongside their names.

3

4

5

THE ADMINISTRATOR: You have several in the same condition of the third page of your proposed exhibit. And on the fourth page.

6

7

8

9

10

11

MR. DUNBAR: I am aware of that. Each of the persons for whom there appears nothing, one of them being Mr. Foreman and the other Mr. Johnson, his co-worker, were people who were on the payroll as of 12/16, 4 for whom we have no further record.

12

13

That is why I did not enter anything under them.

14

15

16

17

18

19

THE ADMINISTRATOR: Am I not opening up old peripheral issues, at least with respect to those names listed, but apparently not on the payroll in January of '75, A, to determine whether they quit or were laid off and, B, if laid off whether they were junior or senior to Mr. Foreman?

20

21

22

23

24

If they were senior to Mr. Foreman and laid off, would I not be entitled to draw the inference that at some point, at least of those representative layoffs, Mr. Foreman would have been laid off?

25

MR. RAFF: If they were due to a reduction

1

2

in force layoff, yes, you would.

3

4

5

6

THE ADMINISTRATOR: I don't know when they were laid off. If six men were laid off on the same day I would assume there was a reduction in force.

7

8

Let me propose a possible avoidance of this problem.

9

10

11

12

13

14

15

I understand that you have prepared an exhibit showing a relative stability of work force over a period of time. Is that not adequate without my being confronted with making a decision to determine when each listed name was non-payrolled beginning January 24, 1975. It is not essential to the determination of the issues before me.

16

17

18

19

20

21

Isn't it your position throughout this proceeding that there was a stable work force and that in all probability, had there been no evidence of discrimination, that Mr. Foreman would have stayed on the job beyond December 1974 or within the next four weeks in January 1975?

22

23

MR. DUNBAR: That adequately states our contention.

24

25

THE ADMINISTRATOR: Would you withdraw the offer of this exhibit?

1
2 MR. DUNBAR: I will.

3 THE ADMINISTRATOR: Would you continue,
4 Mr. Dunbar?

5 MR. DUNBAR: I have no more questions
6 for Miss Elias at this time.

7 CROSS EXAMINATION

8 BY MR. COLLERAN:

9 Q. Miss Elias, were you asked to check the
10 records of the employer for the period immediately
11 preceding January 24, 1975, as to layoffs?

12 A No. I can't recall right now.

13 Q Do you have any records with you from the
14 employer which would indicate that kind of information?

15 A They are in my file that is here today.

16 MR. DUNBAR: Did you want to see the
17 records?

18 MR. COLLERAN: I want her to look at
19 the records and tell me if there were people laid
20 off at or about the time Mr. Foreman was laid off
21 and prior to his one-month period thereafter.

22 MR. RAFF: I am going to object to
23 the use of the word "layoff." We know they were
24 not on the payroll, but we don't know why. It
25 could have been termination for stealing or quit

1
2 or --

3 THE ADMINISTRATOR: Let us see if
4 she has any such information. If she can
5 identify it as dropped from the payroll if
6 she doesn't know why.

7 THE WITNESS: Prior to what date?

8 BY MR. COLLERAN:

9 Q Prior to the period between December 13,
10 1974 and January 24, 1975.

11 A December 20th there were 78 lathers in all
12 categories working.

13 Q What date is that?

14 A December 20, 1974.

15 During the week of January 3, '75 --

16 Q Don't you have a week in between that?

17 A For some reason it's not in here.

18 -- there was a reduction of five.

19 Q January 3rd shows what?

20 A A reduction of five lathers.

21 Q Down to 73?

22 A Yes.

23 January 10, '75 there was one, a reduction
24 to 72. It was maintained the week of the 17th and the week
25 of the 24th it was reduced by two more which brought it

1
2 to 70.

3 That was maintained until the end of January
4 of '75.

5 MR. COLLERAN: That is all I have.

6 THE ADMINISTRATOR: Anything else, Mr.
7 Dunbar?

8 MR. DUNBAR: I don't think so.

9 THE ADMINISTRATOR: Thank you very
10 much, Miss Elias.

11 (Whereupon, the witness was excused.)

12 MR. DUNBAR: I think that in light of
13 your decision on our motion for reconsideration,
14 I believe that Mr. Foreman has made a prima
15 facie presumptive case based on statistical
16 evidence that in fact his work opportunity
17 did not end after four weeks as previously
18 ruled upon by the Administrator based on Mr.
19 Linner's testimony.

20 I don't wish to put on any more direct case.

21 THE ADMINISTRATOR: I will reserve your
22 rights to introduce any evidence --

23 MR. DUNBAR: At a later date I would like
24 to introduce evidence as to damages. But at
25 this time I don't wish to introduce anything

1

2

further.

3

THE ADMINISTRATOR: Mr. Colleran?

4

MR. COLLERAN: I would like to call

5

Mr. Kruckel.

6

EUGENE L. KRUCKEL, called as

7

a witness, having been first duly sworn

8

by the Administrator, testified as follows:

9

THE ADMINISTRATOR: Please give the

10

reporter your full name.

11

THE WITNESS: Eugene L. Kruckel.

12

DIRECT EXAMINATION

13

BY MR. COLLERAN:

14

Q Are you employed by North River Perini

15

Associates?

16

A Yes.

17

Q In what capacity?

18

A General lather foreman.

19

Q Would you briefly describe what your

20

function is in connection with that position?

21

A As a general lather foreman employed by

22

Perini to oversee the job and make sure the job is done

23

in a right way.

24

Q Do you have any control over the hirings

25

and layoffs on that job?

1

2 A Of course. I am the sole hirer and firer.

3 Q I take it you are familiar with the discharge
4 of Mr. David Foreman?

5 A Yes.

6 Q Which took place on December 13, 1974?

7 A Right.

8 Q To your knowledge, were there any other
9 lathers laid off from your complement of lathers subsequent
10 to December 13, 1974?

11 A Of course. Out of the same gang for the
12 same reason.

13 Q Can you tell us who was laid off and
14 at what time?

15 A A fellow named Dunn, another fellow named
16 Eggers, who didn't carry their own weight in the gang.

17 MR. RAFF: I am going to object to
18 this. There has been a ruling on the merits
19 of Mr. Foreman's case.

20 The question is reduction in force due to
21 layoff.

22 THE ADMINISTRATOR: I will take the
23 evidence. We cannot be too formal. I will
24 determine upon reading the transcript what is
25 relevant and material.

1

2

Please continue with your answer.

3

Q Just to help you out, did you make up a

4

list of employees, lather employees who were terminated at

5

or about the time that Mr. Foreman was terminated?

6

A Yes. We went from a work force of close

7

to maybe 80 men at the time down to a work force of 70

8

men by the 1st of January.

9

Q Do you know where Mr. Foreman was working

10

at the time he was laid off?

11

A In the cofferdam.

12

Q What was the progress of the work in the

13

cofferdam.

14

A Practically done. We had a few more weeks

15

to go on that, with a full work force.

16

Q Was that work actually completed in the

17

cofferdam without roughly a month's time?

18

A The majority, yes.

19

Q After Mr. Foreman was laid off?

20

A Yes. We always have to go back and do

21

odds and ends with a couple of guys.

22

Q But substantially, it was finished?

23

A Yes.. Mr. Linner was then in the beam

24

section, Section 3 of the job site.

25

Q Had Mr. Foreman stayed on the job until that

1

2 cofferdam work was finished would he have continued on
3 the job?

4

A No. When Mr. Linrer told me Mr. Foreman
5 would not carry his own weight --

6

MR. DUNBAR: Objection. I believe
7 your decision has already decided that point.

8

THE ADMINISTRATOR: No. I didn't
9 deal with that at all, that is what nobody seems
10 to understand.

11

MR. COLLERAN: I understand that.

12

THE ADMINISTRATOR: My decision on the motion
13 for reconsideration in both instances dealt with
14 the union's failure to comply with the hiring hall
15 rules, which was implicitly to determine whether
16 there had been some discriminatory action or
17 activity in connection with Mr. Foreman's
18 employment.

19

MR. DUNBAR: I withdraw my objection.

20

BY MR. COLLERAN:

21

Q Would you go back to the question I asked.

22

A Do you want to repeat it?

23

(Record read.)

24

A When any of my foremans tells me that a man
25 is not carrying his weight and they don't want him in a

2 gang he automatically goes off the job. I fire him.

3 Q Mr. Kruckel, did Mr. McGovern who was
4 formerly one of the business agents of Local 46 speak to
5 you about Mr. Foreman thereafter?

6 A Right. He called me up on the phone the
7 following day after he got the complaint from Mr. Foreman,
8 asked me why, I told him the reason. He said that
9 is all they can do.

10 Q Did he come down to the job the following
11 day and talk to you again?

12 A He talked to the shop steward and he talked
13 to me and I said I would not hire him.

14 Q Was there anything that Mr. McGovern could
15 have done or anybody from the union that would have
16 required you to take Mr. Foreman back to work?

17 A No, sir, nobody can tell me who to hire and
18 fire.

19 Q Are you familiar with the fact that Mr.
20 Foreman has made a complaint to the United States
21 Environmental Protection Agency about his discharge?

22 A As being racist, yes.

23 Q And I show you this letter from that
24 agency, Mr. Smallwood --

25 A I read it, and he finds we were not --

1
2 Q I ask you to identify the letter. Did
3 you ever see that letter before?

4 A Yes.

5 MR. COLLERAN: I am going to offer that
6 in evidence.

7 MR. DUNBAR: It might as well go into
8 evidence. But as to relevancy, this particular
9 case is not concerning Executive Order 11246.
10 This case is under the union's duty pursuant
11 to a consent decree from the United States
12 District Court.

13 There are different standards as to what
14 the union's duty is and the employer's duty.

15 MR. COLLERAN: I want to lay to rest
16 the fact that Mr. Foreman was not discharged
17 for race and that was defined by a government
18 agency in that letter which you have in your hands.

19 THE ADMINISTRATOR: It will be received
20 as Union Exhibit 1, on March 4, 1974.

21 (Letter dated March 4, 1974, from the
22 United States Environmental Protection Agency,
23 received in evidence as Union Exhibit 1,
24 as of this date.)

25 MR. DUNBAR: May I ask some questions

1

2

3

4

5

VOIR DIRE EXAMINATION

6

BY MR. DUNBAR:

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

about the letter since Mr. Colleran has used the
letter as presumptive evidence that Mr. Foreman
was not fired for race?

Q Did you speak to Mr. Smallwood about the
letter?

A No.

Q Do you know, to your knowledge, whether Mr.
Smallwood ever held any hearing on Mr. Foreman's complaints?

A I know he was on the job walking around,
talking to people.

Q Did he talk to you?

A No, sir.

Q Do you know whether he held any hearing
regarding Mr. Foreman's complaints?

A No, sir.

MR. DUNBAR: That is all I have.

MR. COLLERAN: I have no further
questions.

MR. DUNBAR: We have some questions on
his substantive testimony.

1

2 CROSS EXAMINATION

3 BY MR. DUNBAR:

4 Q You say you are the sole person hiring and
5 firing --

6 A Right.

7 Q -- lathers on the job site?

8 A Right.

9 Q Did you ever observe Mr. Foreman in his work
10 habits?

11 A I observe everybody.

12 Q What did you think of Mr. Foreman?

13 A Well, let me put it this way: I have

14 a quota on the job that I have to maintain to and if

15 you look at the records, I have laid men off beforehand

16 who came after him and not for that reason but because

17 they didn't do no work either.

18 But I always have to keep a certain amount

19 of blacks on the jobs and when I lay off I have to be

20 careful of what I do. So this is probably why he stayed

21 as long as he did.

22 Q I would like you to give me some specifics.

23 Your testimony claims or the indication of testimony

24 is that Mr. Foreman was a poor worker.

25 Would you mind giving me some specifics?

1
2 A First of all, he probably would have went a
3 hell of a lot sooner because of his work.

4 Q I have asked you for instances of his poor
5 work or instances --

6 A Many a time I walked around, looked down
7 the cofferdam and I could see Mr. Foreman talking with
8 anybody down there

9 Q When was this?

10 A When I was observing the job. What do you
11 want me to go back on days?

12 Q You have stated that you felt that Mr. Foreman
13 was a poor worker, yet you have not given me one instance.
14 Do you have any instances or are you basing your opinion
15 on something that Mr. Linner told you without any personal
16 knowledge at all?

17 A Not only Mr. Linner but Mr. Lentz was his
18 immediate superior.

19 Q Did you yourself ever see --

20 A Of course I did.

21 Q When?

22 THE ADMINISTRATOR: Don't pound. You
23 don't have a jury to demonstrate to here. I am
24 just trying to get the facts.

25 If he can answer, let him answer.

1

2

A On many occasions I have watched him on

3

different phases of the job. It was not always in the

4

cofferdam. He was on makeup. He was taken out of

5

different jobs and put on other things so we could try

6

and keep him going, but it seemed like no matter where

7

you put him he was always talking with this other fellow,

8

Johnson, that was let go at the time.

x

9

Q I still ask you --

10

MR. COLLERAN: He has given us his

11

general observations of the man's work performance.

12

MR. DUNBAR: I can't rebut a general

13

observation.

14

MR. COLLERAN: I am sorry if you can't,

15

but that is his testimony.

16

MR. DUNBAR: I am trying to distinguish

17

what his testimony is because at one point he

18

stated --

19

THE ADMINISTRATOR: You must assume that I

20

hear the testimony, that I draw my conclusions, that

21

I am not a lay jury here that has one experience

22

with a set of facts where somebody is trying to

23

get damages from somebody else he has never seen

24

before and whom he will never see again.

25

I understand and I listened to the witness

1
2 on direct testimony when he said before "Mr. Linner
3 came to me and said the fellow isn't pulling his
4 weight and whenever one of my foremans comes to
5 me and tell me he is not doing his work I fire
6 him."

7 He didn't say he made his own observations.
8 He said he relied on his foreman.

9 I heard all that.

10 BY MR. DUNBAR:

11 Q Mr. Kruckel, you testified that after Mr.
12 Linner's gang had finished in the cofferdam that the gang
13 went to Beam Section No. 3.

14 A Right.

15 Q Was Mr. Linner still the assistant foreman
16 of the gang?

17 A He was the foreman of the gang.

18 Q When Mr. Linner goes to Beam Section No. 3
19 he takes his whole gang with him?

20 A What he had left.

21 Q His gang minus Mr. Foreman and Mr. Johnson?

22 A And Mr. Eggers, Mr. Dunn, Mr. Malone. He
23 ended up with three or four men from the original gang of
24 the cofferdam going into beams.

25 Then we built it up to a 10-man gang in the

1
2 beams again.

3 Q Maybe you could help me out by telling me
4 at the time Mr. Foreman was laid off, approximately the
5 13th of December of '74, who was in Mr. Linner's gang?

6 A Sure. Robert Teliesha, Bernard Sullivan,
7 John Kelly, Ronnie Duggins.

8 Excuse me, did you ask before he was laid off?

9 Q As of the date of Mr. Foreman's layoff.

10 A Vinnie Johnson.

x 11 Q Johnson and Foreman were the two laid off
12 together?

13 A So Foreman was in the gang.

14 John Long, Robert Fuller, R. Peters, Gene
15 Maloney.

16 Q May I have your testimony again as to what
17 happened after Mr. Foreman was laid off? Did you
18 say Mr. Linner's gent went to Beam Section No. 3 and
19 was reduced down to three men?

20 A I said that he had approximately four weeks
21 to finish what he was doing in the cofferdam and then he
22 went into Section 3 on beams and after that we sent
23 back one or two men to do corrective work from the
24 cofferdam when it was needed.

25 THE ADMINISTRATOR: You also said that

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

by the time he went over to beams from the
cofferdam, that he had about three men of the
original gang left.

THE WITNESS: Three or four, yes.

THE ADMINISTRATOR: And that then at some
future time he built it up back again?

THE WITNESS: Yes.

Q Do you recall who the three or four men
were, offhand?

A Who were still at the gang at that time?

Q Yes. When we moved to Beam Section 3.

A Robert Teliesha, John Kelly, Bernie
Sullivan, Ronnie Duggins and Robert Fuller, five men.

Q Mr. Long, according to the records submitted
by the contract, has continued his employment with
Perini North River?

A Right.

Q Is he in Mr. Linner's gang?

A No.

Q Why is he not?

A Because since the time he was employed I
started new machines on the job and he is a machine man
and that is where he is as of now.

Q In other words, while Mr. Linner's gang may

1
2 have lost Mr. Foreman and Mr. Johnson, it didn't lose
3 Mr. Long, Mr. Long got the opportunity to continue? Even
4 though he wasn't with Mr. Linner's gang any more he still
5 stayed on the job?

6 A Right. But Mr. Long was hired to run a
7 bending machine and at the time he was hired the machines
8 were not on the job yet. So you don't just let the man
9 stand around, you put him some place to work.

10 And being that Mr. Foreman and Mr. Johnson
11 and whoever else we let go, we just filled in until the
12 four weeks of full work was completed and then we put
13 him on the machine.

14 In fact, I don't know even if in the next
15 week he was on the machine or not.

16 Q But in fact a person's work opportunity
17 would not necessarily end when Mr. Linner's gang moved, that
18 person would be shifted to another job?

19 A That's right. If the guy is a good worker
20 he would be shifted. If the guy is no good he goes
21 out the door. There was a two-way street.

22 Q Could you tell me the circumstances of
23 the departure of Mr. Gene Maloney from the payroll
24 at the time?

25 A To be honest with you, I think he was taken

1
2 off and sent to another job as a shop steward or something
3 like that or transferred to another job.

4 Q Did he request the transfer or did the
5 employer request it?

6 A This I can't remember, offhand.

7 MR. COLLERAN: If you don't know, you
8 don't know.

9 THE WITNESS: I would like to give the guy
10 an answer, but at this time I really couldn't
11 tell you whether he requested it --

12 Q But he was not terminated for lack of work?

13 A No.

14 MR. COLLERAN: It wasn't a question of --

15 A No. He was a good worker.

16 MR. COLLERAN: Was he terminated for lack
17 of work?

18 THE WITNESS: At that time, no.

19 Q That brings me to Mr. Peters. He was on the
20 work force about that time and he was no longer employed
21 as of January '75.

22 A He got laid off.

23 Q Why was Mr. Peters laid off?

24 A Lack of work. We were starting to close
25 the section down. He went that week or the week after.

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Q Are you sure Mr. Peters was laid off for lack of work? Could it not have been that Mr. Peters had a back injury and he left his job?

A He is still here on the payroll two weeks after.

Q He testified under oath that he had a recurrent back injury allegedly inflicted through Mr. Foreman's negligence.

MR. COLLERAN: My recollection is that he came back to work.

MR. DUNBAR: I didn't recall the testimony. I just wanted to establish it.

A He left the week of --

Q But you don't know whether he left because of physical problems or not?

A Not physical.

MR. DUNBAR: Thank you.

That is all.

THE ADMINISTRATOR: Anything more of this witness, Mr. Colleran?

MR. COLLERAN: No.

THE ADMINISTRATOR: Thank you, Mr. Kruckel.
(Whereupon, the witness was excused.)

THE ADMINISTRATOR: Is there anything else,

1

2

gentlemen?

3

MR. COLLERAN: I have no more witnesses.

4

MR. DUNBAR: We don't have anything else

5

as to that. However, we would like to put our

6

client on as to damage, have testimony as to

7

damages.

8

THE ADMINISTRATOR: Do you want to put him

9

on now?

10

MR. DUNBAR: Yes.

11

DAVID FOREMAN, called as a

12

witness, having been first duly sworn by

13

the Administrator, testified as follows:

14

THE ADMINISTRATOR: Give the reporter

15

your full name.

16

THE WITNESS: David Foreman, 793-5

17

Freeman Place, Bronx 10460.

18

MR. RAFF: I will be doing the direct

19

of Mr. Foreman on damages.

20

THE ADMINISTRATOR: Go ahead.

21

DIRECT EXAMINATION

22

BY MR. RAFF:

23

Q Mr. Foreman, when was the last time that

24

you were employed as a lather?

25

A December 13, 1974.

1

2 Q Since that time have you had any employment?

3 A No, none whatsoever.

4 Q Have you had any earned income since that
5 time?

6 A No, no earned income.

7 Q Have you been collecting any government
8 benefits since that time?

9 A Unemployment insurance.

10 MR. RAFF: I have no further questions.

11 CROSS EXAMINATION

12 BY MR. COLLERAN:

13 Q Have you made any effort to get employment?

14 MR. RAFF: Objection. That is
15 affirmative defense.

16 If you wish to put on evidence that
17 there were jobs available, please do so. But
18 I will object to that on cross.

19 THE ADMINISTRATOR: Overruled.

20 MR. COLLERAN: He has an obligation to
21 administer damages.

22 MR. RAFF: I would like to point out that
23 Mastro Plastics makes it very clear.

24 clear THE ADMINISTRATOR: I am not interested.

25 You take your appeal if you think Mastro Plastics

1

2

prevails.

3

4

5

6

7

8

9

10 BY MR. COLLERAN:

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Q Mr. Foreman, did you make any efforts to seek employment?

A Yes. I shaped the union hall.

THE ADMINISTRATOR: Under the Federal Rules the limits on the acceptance of evidence are more difficult to adhere to than it is to get the proverbial camel through the proverbial eye.

Q You said you shaped the union hall?

A Yes, I did.

Q And you had no referrals to jobs; is that what you are saying?

A No, none whatsoever.

Q Did you try to get employment any place else other than the union hall?

2 A I make a few applications when I see it in
3 the News.

4 Q You mean written applications?

5 A Telephone calls.

6 Q From the newspaper advertisements?

7 A Yes.

8 Q Did you ever go personally to any place and
9 ask for a job, other than the union hiring hall?

10 MR. RAFF: He had no duty to look for
11 work other than lathing work for which he had
12 training and experience.

13 Q What did you do before you had lathing --

14 THE ADMINISTRATOR: I will allow the questions

15 A I was in labor work, labor construction work.

16 Q Were you in a union?

17 A Yes. I was in the Labor Union, but I can't
18 remember the number.

19 Q Did the union have a hiring hall?

20 A Yes. They have a hiring hall in Williamsbridge
21 Road, but I left this union when I came into the Lathers
22 Union.

23 Q Did you ever go back and try to get work
24 again?

25 A I wasn't in the union so I didn't go.

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Q Did you ever go back and try to get reinstated in the union?

A I didn't see no reason to do that because I was already signed with the Metal Lathers Union.

Q But you weren't working.

A I think if I am a member of the union I am entitled to work just as any other members.

Q But you weren't able to get work as a lather, that is the point I am getting at.

A I didn't make it difficult for myself.

Q When you go down to the hall to sign in, did you go down every day?

A It's not every day. I have the fare to pay. I go down when I get the fare to pay.

Q What time did you get down there?

A Sometimes I reach eight o'clock, five to eight, 8:30.

Q And you sign in and what happens, you stand around for a little while?

A Yes. I sit around and nobody paid me no attention.

Q On the days you didn't go to the hall to sign in, did you ever try to get employment some place else?

A I go around construction sites and ask them

1
2 for work and they say they can't give me work because I
3 am a union member, I have to go to the hall. So I
4 explain to them and tell them the hall isn't moving so
5 much and they have a list from December 1974.

6 They have a list from December 1974 until
7 now and they are not calling the last.

8 Q What I am trying to get at, what other
9 efforts you made to get employment in any place.

10 A As I said, I walk around construction
11 site and asking them for work and they are showing me
12 that as a union member they cannot hire me in that
13 respect, I have to go to hall and let the hall work
14 for me.

15 Q Did you try to get any work in any other
16 kind of industry other than construction?

17 A Construction is what I know and that is what
18 I try to get work.

19 Q But you know some people drive a taxicab or
20 become bartenders.

21 A I can't drive.

22 Q Shipping clerks, there are other kinds of
23 work besides construction work. You didn't make any
24 efforts to get any other kind of job?

25 A As I said, I went to construction site and

1
2 asking them for jobs and they said they cannot hire me
3 in that respect, I have to refer from the hall.

4 MR. COLLERAN: That is all I have.

5 MR. RAFF: I have some questions.

6 REDIRECT EXAMINATION

7 BY MR. RAFF:

8 Q You indicated you are collecting unemployment
9 insurance benefits.

10 A Yes, I am.

11 Q Are you registered with the State Employment
12 Service? Did you go to the State Employment Service?

13 A Well, when I went to the employment service
14 they didn't send me anywhere.

15 Q You did go to the employment service,
16 though?

17 A Yes, I went.

18 MR. RAFF: Thank you.

19 I have no further questions.

20 MR. COLLERAN: That is all I have.

21 MR. DUNBAR: On the issue of damages

22 I would like to call Mr. Edmund Hennessy.

23 E D M U N D H E N N E S S Y , called as

24 a witness, having been first duly sworn by

25 the Administrator, testified as follows:

1

2

THE ADMINISTRATOR: Give the reporter

3

your full name.

4

THE WITNESS: Edmund Hennessy.

5

DIRECT EXAMINATION

6

BY MR. DUNBAR:

7

Q Could you tell me for whom are you employed

8

and in what capacity?

9

A Perini North River, and I am the office

10

manager.

11

Q Are you, in your capacity as an office

12

manager, in charge of payroll records?

13

A I oversee the payroll records, right.

14

Q What hourly rate are lathers currently

15

paid in wages?

16

A I don't know the rate, offhand. I see the

17

bottom line of the payroll. My paymaster does the

18

payroll.

19

Q Do you know whether the lathers get certain

20

fringe benefits in addition to wages?

21

A Lathers, yes.

22

Q Do they get a contribution to a welfare fund?

23

A Right.

24

Q Are they paid a contribution to a pension

25

fund?

1

2

A Right.

3

Q Are they paid a contribution to a scholarship

4

fund?

5

A Not to my knowledge.

6

Q Are they paid a contribution to a vacation

7

fund?

8

A Right.

9

Q Are they paid a contribution to an apprentice-

10

ship fund?

11

A I believe there is.

12

Q Are they paid a contribution to a promotional

13

fund?

14

A I don't know that, either.

15

Q Are they paid a contribution to a so-called

16

Urban Affairs fund?

17

A They have been.

18

MR. COLLERAN: May I make an inquiry?

19

What does it mean "are they paid?" The money

20

is paid into trustees to a fund not to the

21

individual?

22

MR. DUNBAR: The individual as part of his

23

benefit package receives a certain payment per

24

hour work into each of these funds.

25

MR. COLLERAN: We will concede that, that

1
2 they get so much per hour and certain amounts are
3 paid into their funds.

4 The individual doesn't receive it. The
5 monies are paid pursuant to trust agreements into
6 funds.

7 MR. DUNBAR: This is for the purpose
8 of establishing what the measure of damages are.

9 MR. COLLERAN: The money that is paid into
10 the industry promotion fund is not going to
11 go to Mr. Foreman. That is a fund that is run
12 by employers.

13 MR. DUNBAR: Every nickel that is paid into
14 any of these funds has been earned by Mr. Foreman,
15 whether or not collective bargaining says that
16 while he is on the job it is to be paid to a fund.

17 If we are talking about what the measure of
18 damages are each of these amounts should go to
19 Mr. Foreman as part of his damages.

20 MR. COLLERAN: I couldn't disagree with
21 you more. The money to the Board of Urban Affairs
22 fund was a penny an hour that the employer agreed
23 to put into the collective bargaining agreement.
24 It wasn't even part of the negotiations.

25 THE ADMINISTRATOR: Why would it not be

1
2 obligated, assuming that I make a finding of
3 damages and direct the union to pay it into these
4 funds, rather than to pay it to Mr. Foreman.

5 MR. DUNBAR: I think that would be
6 appropriate if Mr. Foreman were reinstated and
7 on the job. But if he is not, this is not really
8 back pay, this is a damage award because the
9 union was never his employer.

10 MR. COLLERAN: That is a good point.
11 That is a damage award not a back pay award.

12 much of his testimony concerning back pay and
13 what he is entitled to goes out the window.

14 THE ADMINISTRATOR: Gentlemen, can we
15 get a stipulation on the record that in addition
16 to direct hourly wages paid the lathers on the job
17 and in accordance with the terms of the contract,
18 there are certain fringe benefits spelled out, as
19 illustrated by the questions and answers which you
20 have just received, to wit, contributions to a
21 vacation fund measured, I presume, by some
22 percentage of the hourly rate, as well as
23 contributions to a pension trust fund, the
24 welfare trust fund and certain other funds which
25 are set forth in the collective agreement between

1
2 the union and either specific employers or
3 the employer associations, which contributions,
4 according to the claim of Mr. Foreman should be
5 considered in the measure of damages, if any,
6 due him, without attempting to go into any detail
7 at this time to ascertain with specificity the
8 percentage of contribution to any fund or the
9 dollar amount represented by such percentage,
10 leaving it to the Administrator to determine how
11 much and to what extent and how payment should
12 be made of such contributions if in fact they
13 represented hourly earnings or would have
14 represented hourly earnings.

15 MR. COLLERAN: I will be willing in order
16 to expedite the proceeding to stipulate that the
17 wages contained in the contract are the wages the
18 man would have been paid the the contributions
19 made to various benefits on his behalf would
20 have been contributed to the funds on his behalf.

21 What I have to point out to the Administrator,
22 and I am sure you are well aware from your exper-
23 ience in the labor field, that all of these funds
24 are trustee funds. Monies are paid into pooled
25 funds and people have to do certain things to

1
2 become eligible to participate in the benefits
3 and a person may well have worked months at that
4 time and in some point in time loses eligibility
5 for benefits and therefore doesn't derive any
6 direct benefit from the contributions into the
7 funds.

8 I would further point out that the penny
9 an hour they were paying into the promotion fund
10 is something the employee would not get. The
11 penny an hour paid into the Urban Affairs fund
12 is something the employee would not get.

13 So you can't blanket and say these are all
14 his benefits. The money was used for certain
15 purposes, not for the particular individuals to
16 benefit necessarily, although he may benefit from
17 it in a tangential manner.

18 THE ADMINISTRATOR: What was done, Mr.
19 Colleran, if you wish to tell me --

20 MR. COLLERAN: I know what you are going
21 to ask me, about the damage cases that we had -- I
22 am glad you reminded me because I had meant to
23 tell you that.

24 They received wages and that was all, no
25 monies paid into the funds were considered in the

1
2 computation in the damages to the individuals.

3 THE ADMINISTRATOR: Was that approved
4 by Judge Frankel?

5 MR. COLLERAN: Yes, it was. And that was
6 the manner in which they received their damage
7 claims.

8 He agreed wholeheartedly with Mr. Dunbar
9 that this is not a back pay case, as such, and
10 therefore it shouldn't be couched in terms of what
11 back pay the man is entitled to.

12 MR. DUNBAR: Agreeing that it isn't the
13 measure of damages is what Mr. Foreman lost and
14 the only measure is what he lost financially
15 by not working.

16 In response to what Mr. Colleran stated
17 I don't think it would be at all fair to give
18 the money, presuming there would be any award to
19 Mr. Foreman for the funds because Mr. Foreman
20 hasn't benefited from y of these funds during
21 the period of his unemployment for more than a
22 year.

23 An award now which hasn't been serving
24 him would be completely counter productive.

25 THE ADMINISTRATOR: I will take that

1
2 into consideration.

3 All I am suggesting is that, without raising
4 the question of need to ascertain with specificity
5 the precise cents per hour or dollar amounts
6 that might arise out of this --

7 MR. DUNBAR: There is none, with the
8 exception that when we received the check from
9 your previous award, of four weeks, the check
10 only included vacation and annuity payments in
11 addition to wages.

12 And the wage payment was not in accordance,
13 to my mind, with the contract. Mr. Foreman was
14 laid off December 13, 1974. He received four weeks
15 of wages at the rate paid December 13, 1974, even
16 though a new contract or new contract provision
17 provided for a wage increase at the 1st of the
18 year.

19 I believe whatever award Mr. Foreman
20 ultimately gets, if any, should follow the pro-
21 visions of the collective bargaining agreement.
22 That is the only reason why I am bringing this
23 evidence in now, so that we can alleviate the
24 problem later of having to fight over what exactly
25 was his supposed rate of pay.

1
2 And in that regard, embodied in your
3 decision from today, I would like some guidance
4 as to whether you feel Mr. Foreman should keep
5 pace with the contractual commitments given to
6 the union over the period of time or whether he
7 should be paid his damage award at a wage rate
8 in existence December 13, 1974, as Mr. Reynolds
9 had signed the check for four weeks.

10 That is the only reason by. But I do not
11 need and don't wish to further clutter the record
12 with more of this.

13 However, I do have some additional questions
14 of Mr. Hennessy.

15 BY MR. DUNBAR:

16 Q Mr. Hennessy, is it customary from time to
17 time that lather journeymen and permanent men work
18 overtime on your site?

19 A Right.

20 Q In the course of keeping payroll records,
21 do you have a record of the overtime worked by lathers?

22 A Yes.

23 Q Do you have a breakdown of the average weekly
24 amount of overtime per man put in by the lather work force
25 for the last year and three months?

1
2 A No. I brought in a copy of each individual
3 man's overtime for the period, for that one-year period.
4 We didn't break it down into any average.

5 Q In otherwords, each man's total hours of
6 overtime during the year 1975?

7 A Yes. The period you asked for.

8 Q Is it fair to assume that if we added up
9 all of the hours and divided it by the number of men on
10 the job we would come to an average yearly number of hours
11 of overtime per person?

12 A Yes.

13 Q Do you have that figure, that average yearly
14 number of hours of overtime per person?

15 A I have a copy here of every weekly payroll
16 on the lathers. I don't have it broken down into
17 any average hours.

18 Q Could I see that?

19 A Sure..

20 (Document handed to counsel.)

21 MR. DUNBAR: I would like to submit this
22 as Mr. Foreman's Exhibit D into the record for
23 purposes of calculation of the average number of
24 hours worked yearly or monthly or weekly, for that
25 matter, by the average lather, for the purpose

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

of damage award.

If Mr. Foreman were on the job he certainly would be expected to have the average number of hours of overtime and that that should be considered as part of the measure of damages.

MR. COLLERAN: I am raising my objection to that offer of an exhibit on the same grounds that I used on the prior exhibit, that the exhibit contains material for periods long after the Administrator has held his hearing and would not be relevant to the proceeding which was heard on May 5, 1975.

I would also point out that in the agreement of settlement made between the government and the union dated February 7, 1970, while overtime was to be distributed as equally as possible, nevertheless, it was recognized that this was not always practical and that not everybody would get the same overtime as the other fellow.

So I think striking an average for that purpose would be meaningless. Probably the only way you could do it was to look at the particular gang he was working with at the time.

MR. DUNBAR: I would stipulate to that,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

that we would just use the particular gang.

MR. COLLERAN: But I don't think it's relevant, in any event, to this proceeding.

MR. DUNBAR: I think it's highly relevant because it has to do with his potential work opportunities on the job.

MR. COLLERAN: May I raise this question? I was going to do it in sort of a closing argument, but it strikes me that the grievant here, or the plaintiff title you want to give him, who had a hearing on May 5, 1975, represented by competent counsel had all of this information available to him at the time.

As of May 5th, Miss Elias testified that she could have brought records down which would have shown who worked after Mr. Foreman had been terminated.

No evidence was given at that time. Mr. Linner testified in that proceeding and could have been cross examined. Nothing was done in that respect to ascertain any kind of basis for granting damages to Mr. Foreman.

I would object to permitting the plaintiff or grievant now to introduce all of this material

1
2 which was available to them at the time, which
3 could have been made known to the Administrator
4 at that time and which wasn't.

5 And I think it's highly improper for them
6 to be coming in now with evidence, a year later,
7 and saying this is what would have happened if
8 this had happened or that had happened.

9 They should be confined to the presentation
10 of their evidence as of May 5th, the date the hearing
11 was held. And the only reason why you should be able
12 to open up the case would be for the ascertainment
13 of new material which they could not have gotten
14 in that period of time.

15 But this material was available to them and
16 could have been produced and presented to the
17 Administrator at that time.

18 So I am going to ask that this testimony
19 given today be stricken from the record, or completely
20 disregarded by the Administrator.

21 MR. RAFF: May I reply?

22 THE ADMINISTRATOR: Yes.

23 MR. RAFF: The point is well made, that
24 evidence as to damages should always be brought
25 forth at the time that one is requesting the damages.

1
2 However, there was no knowledge on the
3 part of counsel or the grievant in this case
4 that there was in any way a reduction in force
5 in effect at the site or may have been or that the
6 entire issue would at all be raised.

7 They were only aware of it for the first time
8 when Mr. Linner testified that the cofferdam gang
9 only had one month to go based upon an imminent
10 reduction.

11 Since there is no examination before trial
12 in these types of proceedings we had no way of
13 knowing what their evidence was going to be.

14 As a matter of fact, when one looks at the
15 transcript of the original hearing you find that
16 that entire exchange was a very minimal exchange
17 limited to one question.

18 We are bringing forth evidence to show
19 that that particular testimony which was given at
20 that time which we were aware of for the first
21 time at that time, was inaccurate and we
22 respectfully request that the Administrator
23 recognize that fact.

24 MR. COLLERAN: I think it should also
25 be pointed out to the Administrator that despite

1
2 the deficiency in proof offered by Mr. Foreman
3 at that time, there was no attempt to reopen
4 this case or to move to reconsider your decision
5 until such time as the union made its motion to
6 reconsider, and that was in September 1975.

7 If there was such a to-do about the
8 inadequacy of the compensation granted to Mr.
9 Foreman at that time, it seems to me that they
10 would have been making motions to reconsider that
11 as quickly as possible.

12 I suspect that if I hadn't move to
13 reconsider there wouldn't have been any motion
14 for reconsideration.

15 MR. RAFF: Not only are the comments
16 highly speculative, but incredible. There was
17 no way we could have known that you would have
18 limited the damage aware until we got your
19 award, and we would move promptly for cross
20 motion and did raise the issue within the time
21 specified within your original order.

22 The damage limitation was not a 2 of
23 made by Mr. Colleran or the union at . . . of
24 the original hearing. Nowhere does that appear.

25 MR. COLLERAN: It strikes me that the

1
2 investigation made by Mr. Dunbar on Mr. Foreman's
3 case, which incidentally was pending for several
4 months, as you remember he had filed a charge,
5 I think, the day after he got discharged or two
6 days, with the State Commission on Human Rights.

7 Subsequently, Mr. Dunbar got into the
8 position of representing Mr. Foreman and months
9 went by before the hearing was called. He had
10 adequate time to prepare his case, present his
11 claim for damages.

12 I think there isn't any question that Mr.
13 Dunbar had gone to the job and knew about the
14 job and knew what was going on on the job.

15 So all of this material was available or
16 could have been available to him on May 5th, the
17 day of the hearing. And to bring it in at this
18 point in time is highly improper.

19 MR. DUNBAR: At the time of the hearing
20 that information could have been put into evidence
21 if that was the issue.

22 At issue in the hearing the union never made
23 the claim that Mr. Foreman's work opportunities
24 would have ended in four weeks.

25 MR. COLLERAN: You are saying the man was

1
2 improperly laid off. If he was you should have
3 made the claim for damages.

4 MR. DUNBAR: I did and you never raised
5 an affirmative defense that his opportunity
6 ended --

7 THE ADMINISTRATOR: Gentlemen, there is
8 before me at the moment an offer to receive an
9 exhibit into evidence. There is an objection
10 to its receipt.

11 In the interest of completing the record
12 in this case --

13 MR. COLLERAN: Before you rule on this
14 may I make one further objection to the introduction
15 into evidence, and that is to the form in which
16 it's being presented.

17 I look at a book that is a good half-inch
18 thick with material in it. Somebody is going to
19 have to make a computation of what the overtime
20 rate is. I think that is an onerous burden
21 to put upon the union, to have to go back and check
22 and do a job which they should have done if
23 they wanted to prove any kind of overtime
24 compensation.

25 This is no way to present it to the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Administrator or to us.

MR. DUNBAR: If this book is accepted I will take it upon myself to provide the Administrator and the parties with a computation of the average overtime worked.

THE ADMINISTRATOR: I will continue with my efforts to offer to dispose of the objection. In the interest of marshalling all of the evidence so that the matter can be concluded and the hearing closed, I will have the exhibit marked as Foreman Exhibit D.

I will regard Mr. Colleran's objection and the arguments he made in the support of the objection as a motion by him for the Administrator to strike from the record the evidence to which he referred, including the exhibit.

I will reserve decision on that motion pending my consideration of the case as a whole.

I also want the record to reflect that it's quite clear that Forman Exhibit D represents, I gather, a Xerox of a computer printout of weekly payroll runs reflecting the number of regular hours worked by employees, regular earnings -- my hesitation indicates an examination

1
2 by me that at least in a casual sense of any
3 notation with respect to overtime hours that would
4 be if they were here.

5 The witness that produced the exhibit has
6 indicated to me where the overtime hours, on a
7 weekly basis, are recorded. The gross earnings,
8 including benefits to which reference was made
9 in an earlier colloquy between counsel and the
10 Administrator.

11 I will accept the exhibit, although it's
12 quite clear that it will be time-consuming to
13 ascertain the average number of hours per week
14 worked by lathers at the Perini site during
15 such time as Mr. Foreman makes claim for.

16 Let the record show that should the
17 Administrator reach the conclusion that Mr.
18 Foreman is entitled, as an element of his damages,
19 to a sum equal to the average hourly rate earned
20 as overtime, the Administrator will consult with
21 the representative counsel in this proceeding to
22 reach agreement on what that average hourly rate for
23 overtime is as reflected by Foreman Exhibit D.

24 I take it that that will be adequate
25 protection for the purpose of the exhibit.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. DUNBAR: Yes.

THE ADMINISTRATOR: If there is no further evidence to be adduced, I would suggest that the hearing be closed.

MR. COLLERAN: I want to make a closing statement.

MR. DUNBAR: As do we.

THE ADMINISTRATOR: Gentlemen, I will urge you to be as brief as you possibly can.

(Payroll records of Perini, received in evidence as Foreman Exhibit D, as of this date.)

MR. COLLERAN: Mr. Moskowitz; I am not going to burden the record with an argument on the factual material presented to you because I know you have been paying close attention to the facts as they have been presented.

What I do want to point out is that in your initial decision you made no finding that the layoff was improper, you rested your determination on the failure of the union to meet its obligations under Rule No. 7, namely to make a reasonable inquiry when requested and to determine whether there is just cause or good cause for the termination

1
2 Your decision correctly observed that
3 the collective bargaining agreements contained
4 no requirement that discharge being based upon
5 just or proper cause nor do they contain
6 arbitration proceedings for the review of the
7 propriety of such termination.

8 Thus, there is no way that the union
9 could have had Foreman reinstated, no matter how
10 aggressively it pursued.

11 And you heard the testimony that no matter
12 what Mr. McGovern had done they wouldn't have
13 taken Foreman back.

14 Your original decision further correctly
15 observed that while No. 7 reserves to employer the
16 right to terminate for just cause, the employers
17 have not been made parties to this litigation
18 nor to the rules and regulations.

19 So the union is caught between the upper
20 and nether millstone. It's the only partly
21 to the whole proceeding vulnerable to a judgment
22 without its having any remedy.

23 I think such a result is unconscionable
24 and unfair.

25 I will remind you again that another U.S.

1
2 Government Agency, the United States Environmental
3 Protection Agency, on May 16, 1975, shortly after
4 the hearing in this case advised Mr. Foreman that
5 his complaint against his employer was not
6 substantiated and that his layoff was not a
7 consequence of race, therefore, it must have been a
8 layoff for cause.

9 Under these circumstances, it would be
10 a travesty of justice to make any further findings
11 enlarging the union's liability.

12 We regard the original decision holding
13 the union liable for four weeks pay as in the nature
14 of a fine or penalty for failure to carry out an
15 obligation seen by the Administrator.

16 We feel that that the four weeks pay was a
17 measure selected by the Administrator as a handy
18 yardstick, rather than a commitment to the
19 principles that the union would be liable
20 for all back pay.

21 Consequently, we feel that the decision
22 originally rendered by you, while we were not happy
23 with it and objected to it, nevertheless should
24 stand as the decision in this case and that no
25 further liabilities should be imposed upon the

1
2 union for what you said was an obligation, at that
3 time, extending from the implicit thrust of Rule
4 7, which unfortunately, perhaps, we didn't see
5 as clearly as you had.

6 The fact is that Mr. McGovern did make an
7 attempt, he called the boss, he went to the job,
8 he didn't have any success, but again we submit
9 no matter how aggressively he pursued these steps
10 he could not have compelled the employer to take
11 Mr. Foreman back.

12 So how we can be stuck for the entire period
13 that Mr. Foreman would like us to be stuck for
14 is beyond me and I don't think any further liability
15 should be imposed upon the union.

16 I would respectfully move that the request
17 for reconsideration be denied.

18 MR. RAFF: It is clear on the face of the
19 last page of your award entered on September 25th
20 where in the same paragraph where you talk about
21 Mr. Linner's testimony about the work gang and
22 the fact that that work gang was going slow and
23 would have continued for another month, and by
24 the fact at the very end of that paragraph you
25 direct that damages in the sum equal to the

1
2 average of four weeks wages be paid, it appears
3 very clear on the face of it that you have tied
4 the damage award to the length of time the job
5 would have continued.

6 We submit that the reliance upon Mr.
7 Linner's testimony at that time, while proper
8 at that time, should be amended now to reflect the
9 true measure of damages, that is the measure of
10 damages from the time of termination to the time
11 when he should have been reinstated.

12 We further would like to note that by the
13 testimony given today, Mr. Linner, Mr. Duggins,
14 Mr. Fuller, Mr. Kelly, Mr. Sullivan, Mr. Teliesha
15 and Mr. Long are all still part of the work force.
16 There is no evidence that there was another
17 reduction in force.

18 The only two people who were terminated
19 were Mr. Foreman and Mr. Johnson, who both happen
20 to be black and Mr. Peters who apparently left for
21 medical reasons.

22 Additionally, the exhibits which were
23 handed in show not only did the work force stabilize
24 with no lower than somewhere around 70, but that
25 the work force dramatically increased during the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

period of time in question.

As a matter of fact in the month of February it went over 100 for lather workers.

Clearly, work opportunities which Mr. Foreman should have been entitled to and was deprived of as a consequence of the union's actions in this matter.

We have established a prima facie case that there was stability in the work force, there was not a reduction in force and that Mr. Foreman was deprived of his work opportunity.

There is no evidence of the bald assertion made here today that Mr. Foreman was terminated for cause. None whatsoever.

We attempted to pin down the witness as to specifics and were given none.

As to mitigation of damages, the union has failed to offer one instance of a job opportunity that Mr. Foreman could have had but passed up.

Additionally, the National Labor Relations Board in Harvest Queen Mill & Elevator, 90 NLRB 320 has held that work that is not substantially equivalent to one's former position need not be accepted.

1
2 We content that taxi driving and the other
3 kind of work is not in the construction and is
4 not substantially equivalent.

5 We further point out that in Fiberboard
6 Paper Products Corporation, 431, Federal 2nd,
7 1206, that a dismissed employee registering at
8 a union hall, which Mr. Foreman did, and with the
9 State Employment Office for Unemployment, which
10 he did, was considered to be a reasonable effort
11 to search for work, and thus entitled the unlawfully
12 terminated employee to back pay, in this case
13 damages.

14 We further point out that Mastro Plastics,
15 in our opinion, is controlling upon the defendant's
16 obligation to come forward and show mitigation
17 as an affirmative defence and that this hasn't
18 been done.

19 We respectfully request that the Administrator
20 award the damages to the full extent requested
21 in this matter.

22 THE ADMINISTRATOR: What about unemployment
23 compensation?

24 MR. RAFF: We contend that unemployment
25 compensation is not a deductible as in National

1
2 Labor Relations Board against Gillete Gin Company,
3 Supreme Court Case 340 U.S. 361, the court
4 refused to deduct unemployment benefits from
5 the gross amount of back pay owed the employee.

6 MR. COLLERAN: The National Labor
7 Relations Board cases are inappropriate in
8 this proceeding. In those cases the employer
9 violated the law by committing an unfair labor
10 practice and the employer was obligated to pay back.

11 We are not the employer, we couldn't reinstate
12 the man if we wanted to. If we got down on our
13 knees to the employer we couldn't get him back on
14 the job.

15 We had no control over that aspect of it.
16 There was just no way of getting that man back on
17 the job.

18 So no matter how aggressively, as you put
19 it, the union was supposed to have acted there
20 was no guarantee that that man would go back on
21 the job. Maybe in the case he would, but there
22 is no guarantee.

23 We can't be held responsible for an employer
24 laying a man off and can't be held responsible for
25 all his back pay that Mr. Dunbar and Mr. Raff would

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

love to have the union fork over.

MR. RAFF: The citation is National
Labor Relations Board.

THE ADMINISTRATOR: I want the U.S. case.

MR. RAFF: 340 U.S. 361. This is NLRB
against Gillete Gin Company. That is the
unemployment.

THE ADMINISTRATOR: I will reserve
decision on this, gentlemen.

Thank you very much.

(Whereupon, the hearing was concluded.)

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Ligia Elias	6	23		
Eugene L. Kruckel	26	32		
David Foreman	42	43	48	
Edmund Hennessy	49			

EXHIBITS

<u>FOREMAN</u>	<u>IN EVID.</u>
A Executive Order 71 with amended Rules and Regulations	7
B Summary of findings	9
C List of lathers on the job as of December 16, 1974	10
D Payroll records of Perini	68

<u>UNION</u>	<u>IN EVID.</u>
1 Letter dated March 4, 1974, from United States Environmental Protection Agency	31



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION II
26 FEDERAL PLAZA
NEW YORK, NEW YORK 10007

May 16, 1975

Mr. David L. Foreman
1690 Bryant Avenue
Bronx, New York

Re: Perini North River Associates
Project No. C-36-178, Contract 5

Dear Mr. Foreman:

This is to inform you of the results of the investigation conducted by this office pursuant to your complaint against the above captioned contractor.

There is insufficient evidence to substantiate your allegations and we conclude that your lay-off was not a consequence of race.

Reasonable cause does not exist to believe that Respondent has engaged in unlawful employment practices in violation of Executive Order 11246, as alleged.

However, Respondent was found to be in non-compliance because of the under-utilization of minority workers in its metal lathers workforce. The contractor has taken steps which have increased the percentage of minority lathers and have given indication of continuing until a twenty (20) percent minority representation of journeymen is achieved.

Sincerely yours,

Kenneth W. Smallwood, Director
Civil Rights & Urban Affairs Division

cc: George Moskowitz
Perini Assoc.
Ed Byrne, GCA
✓ Gerald J. Dunbar

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff

Against

Re: David Lloyd
Foreman

WOOD, WIRE AND METAL LATHERS
INTERNATIONAL UNION, LOCAL
NO. 46 et al

DECISION BY ADMINISTRATOR

By decision dated September 25, 1975, I concluded
that:

"...In my judgment the Union had a duty to consciously and conscientiously attempt to seek employer's review and reassessment of Foreman's job performance and to suggest or recommend some measure of corrective action short of termination. Since the Union did not do this, it is my judgment that David Lloyd Foreman should be made whole for the lost opportunity to work another month on the job."

Thereafter, Foreman moved for reconsideration of this decision, and a further hearing was held on his claim that damages be awarded to him, measured by his loss of wages from the date of his layoff to the date of actual reinstatement. To

support this claim, it was submitted on Foreman's behalf that the work at the Perini North River job site continued for a substantial period of time after Foreman's layoff and beyond the work expiration date as projected by Supervisor Linner.

In this respect, while I do not regard this fact as quintessentially relevant, the evidence established that the "Lather Work Force" at this job site dropped from eighty (80), on December 13, 1974 (the date that Foreman was laid off) to seventy (70) lathers on January 24, 1975. I cannot ignore the evidence that, after December 13th, others who had been working in the cofferdam gang with Mr. Foreman were also laid off. The five (5) remaining lathers (from the cofferdam) went into Section 3 to work on beams. I must also take into account the testimony of Mr. Kruckel, the General Lather Foreman, who testified that Mr. Foreman was laid off because he was not regarded as a satisfactory worker. The record of the hearing also establishes that as a result of an investigation conducted by the United States Environmental Protection Agency, that agency determined that "there is insufficient evidence to substantiate your [Foreman's] allegations and we conclude that your lay-off was not a consequence of race."

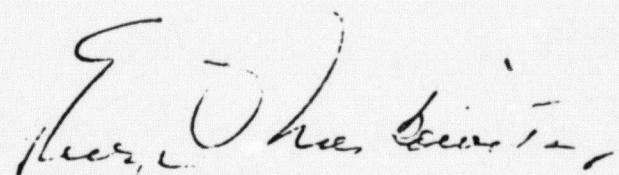
My earlier decision in this matter raised by Mr. Foreman was - in essence - not a determination that Local 46 caused Foreman to lose his job or his earnings, or that it could compel the contractor to continue Foreman in employment. My determination was that the Union was derelict in responding to Foreman's complaint to secure an explanation for the layoff of Foreman when he was of the view that lather work was still available. Even such inquiry by Local 46, if expeditiously made would not necessarily have assured Foreman of reinstatement or continued employment.

Neither the settlement stipulation, nor the collective agreement between the Union and the industry signatories provide for Union review of the propriety of layoffs or terminations of lathers. But the Union does have an obligation under the Settlement Stipulation and the Hiring Hall Rules and Regulations to make reasonable and expeditious inquiry that a layoff or termination was not discriminatorily motivated. I find no express language in the Collective Agreement, the Settlement Stipulation or the Hiring Hall Rules and Regulations from which I may reasonably extract an intent to vest in Local 46 the authority to compel a contract-employer to employ or retain in employment a job applicant sent to the contractor through the Hiring Hall.

I adhere to the conclusion reached in my original decision in this matter. Local 46 did not become Mr. Foreman's employer. It had no power to compel Perini Associates to continue Mr. Foreman in employment. It did have an obligation to investigate Mr. Foreman's complaint. Had it ascertained that the employer's action was racially discriminatory, or that the employer's action might subject the Union to the possibility of a charge that Rule VII of the Hiring Hall Rules had been violated, it could have appealed to the Administrator for relief. For its failure to do so, it was assessed four (4) weeks pay in favor of Mr. Foreman.

The adoption of the principle urged by counsel representing Mr. Foreman will not, in my judgment, serve to insure the fullest exercise of responsibilities mandated to Local 46 by the Settlement Stipulation or the Hiring Hall Rules and Regulations.

Dated: New York, N.Y.
September 27, 1976


GEORGE MOSKOWITZ, Administrator

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Plaintiff

against

WOOD, WIRE AND METAL LATHERS
INTERNATIONAL UNION, LOCAL NO. 46

Defendant

DECISION BY ADMINISTRATOR

In the course of monitoring compliance with the Hiring Hall Rules and Regulations by Local No. 46, the undersigned as Administrator conducted a number of hearings at the request of the United States Attorney for the Southern District of New York "...to inquire into and explore... various allegations and to determine whether non-compliance with the court's orders has occurred" as alleged by the Government.

Re: Norman Saline

Norman Saline was sent to the Fort Belknap River Project site at 117 Street on April 1, 1975, where he was initially assigned to fabricate beams, and did so for about

BEST COPY AVAILABLE

two (2) weeks. He was laid off on May 13, 1976 and on the following morning Nairne went to the Hiring Hall and notified a Union Business Agent that he had been laid off. On May 15th, the United States Attorney requested an inquiry into the circumstances of Nairne's layoff.

The Employer, North River Perine Associates, by its General Lather Foreman, Gene Kruchel, offered the explanation (for the layoff) "...we had a backlog of beams made...So it had to come to a time where I had to lay off a certain percentage of men. There were ten men laid off the day Nairne was laid off, too." According to Kruchel, he had under him some 6 or 8 gangs, and "when I have a layoff I just tell the foreman I want men eliminated. And it's their business to give me the names."

However, Kruchel also testified that seven men were hired later than Nairne. On the layoff which included Nairne, ten men were laid off. Eight men were white; one of them had less seniority on the job than Nairne. The evidence clearly indicated that the work force was reduced because the job had reached a point where a backlog of beams had accumulated.

The Government contends that Nairne was laid off solely because of a reduction in force, or a completion of

the work that his gang was performing. The U.S. Attorney stated in his post-hearing memorandum: "Hairne was, accordingly, not singled out for termination but laid off along with others in his gang."

It is urged by the Government, and I agree, that Hairne's layoff was in direct violation of Rule VII of the Hiring Hall Rules and Regulations which requires that:

"No workman shall be laid off until all workmen of his job performing the same class of work who commenced work subsequent to him have been laid off. Nothing in this paragraph shall derogate from the right of an employer to lay off workers for cause."

The proof before me established that men, hired after Hairne to do the same kind of work, were retained in employment after Hairne was laid off.

The Union's post-hearing memorandum, submitted by its counsel urges that the concept of job seniority is completely foreign to the building and construction industry. It was so urged before me and it was nevertheless approved Hiring Hall Rule VII as stated above. The Union now argues that the language "the same class of work" has not been defined. The Union's argument is not at all convincing. Before the Administrator the Union argued that the

persons hired subsequent to Nairne but retained in employment after Nairne's layoff, were hired to do a class of work "different" than that for which Nairne was hired. Certainly, there was no proof that those with less seniority were retained in employment because they were hired to perform specialty work such as welding or tag writing.

Finally, there is no proof before me that the Union sought to fulfill its obligation to comply with Rule VII by seeking recognition and enforcement from the Employer of members of Local No. 45 employed by Terint in supervisory positions.

Re: Richie Joseph and Alfonso Joseph

Joseph and Joseph, both recall on, along with other permission were sent from the Union Hall to the Big Underhill job site at 61 Street and 147th Avenue, in New York City on April 17, 1976. When the Union men were laid off at the end of the day, they went back to the Hall. Hall received a request for four (4) men to go out after permission to the job site. In the afternoon, the men who had been assigned to the job site the previous day, were told by the Union men that they were not to go, as they were not part of the Union. The men who were not part of the Union, were told that they were not to go to the job site.

The Union contends that there was no "deliberate act on the part of Francis [lather foreman] to get rid of Jessup and Noquera"; that it was an unfortunate situation which arose because of lack of communication between superintendent and foreman; and that there is no proof that the Union through its officials had any knowledge or participation in the layoff for which it should be held liable.

The argument of the Union ignores the commitment assumed in the adoption of the Hiring Hall Rules and Regulations as part of the settlement and consent decree entered in the litigation between the United States Government and Local No. 46. The basic purpose of the litigation and subsequent consent decree was to open job opportunities within the jurisdiction of the Union for blacks and other minorities on a non-discriminatory basis. The Union undertook certain specified responsibilities, particularly those related to the operation of the Hiring Hall. Relevant to the situation involving Jessup and Noquera, the Union specifically undertook:

1. To obtain information relating to the "expected duration of job." (Rule III, 1.)
2. To announce to all registrants present at the Hiring Hall the "...expected duration of the job. (Rule IV, 1, 2).

Re: Idgar Williamson and David Wilkerson

because of insufficient production. At the hearing, the contractor, through its foreman, offered proof that on such an assignment - cutting 150 foot rolls of wire netting into 15 foot lengths - an average normal production would be ten rolls, but that the contractor would have been satisfied with a production of eight rolls. The contractor also offered evidence that five white men were laid off for non-production.

An earlier decision issued by this Administrator on September 25, 1978, as the result of an inquiry concerning the layoff of David Lloyd Foxman contained the following statements which are apposite here:

"On the question before me, I do not regard it essential to determine whether the employee had just or good cause to forgo the Bureau. The issue before me, as I see the problem is whether the Bureau fulfilled its duty under the Civil Service Rules and Regulations to hold a fair inquiry--essentially an investigation--complaint from a private individual is a non-viva negative--no for which is just cause existed..."

litigation. A history of denial of economic opportunity is not obliterated, nor is the minority worker recompensed by a work assignment through the Hiring Hall if the Union passively tolerates an employer's exclusive judgment that a minority worker "was not working productively." The Union must show some aggressive positive effort to secure the employer's cooperation toward the setting of standards that are reasonable within the context of specific work assignments and learning time span of those who have been historically, if not traditionally barred from participating in such work."

My decision is as follows:

1. The Union, Local No. 40, is directed to notify Permit holders Norman Moore, Alvin Jones, Alvin Brown, Edgar Williamson and Mrs. Walker of the decision by the Administrator of their respective status.
2. The Union shall offer each with a contractor's job referral to each of the above-named for employment (a) at the specific job sites from which they were laid off, or if such operation have been completed or ceased then (b) to offer job referral to another functioning job site of the prior employer, or at the option of aforesaid permittees (c) to place the name of any of the aforesaid permittees at the head of the priority list from which current job referrals are being made.

3. By way of financial remedy, the Union is directed to pay to each of the above-named permit-holders, within two weeks of the issuance date of this report and decision, a sum equal to the amount each of said claimants would have earned had he been laid off in the regular order of seniority, instead of the date of layoff of which complaint was herein made, as required by Hiring Hall Rule VII.

4. Since proof of the amount of wage loss was not presented at the hearings before me, I direct that the Union meet with the United States Attorney to reach agreement on the amounts due to the respective claimants, and that this be done within one (1) week of the issuance of this report and decision.

5. In the event that the parties cannot reach agreement, I will accept notice testimony and other evidence on this issue.

Dated:

New York, New York.

August 2, 1976

George J. ...

George J. ...

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA,

Plaintiff,

: 68 Civ. 2116

-against-

WOOD, WIRE AND METAL LATHERS
INTERNATIONAL UNION, LOCAL NO. 46,

Defendant.
-----x

:
: MOTION FOR
: RECONSIDERATION

SIR:

PLEASE TAKE NOTICE that, at a time and place to be determined by the Administrator, George Moskowitz, Esq., the undersigned herewith moves for reconsideration of the Decision by Administrator dated September 25, 1975 in which the Union is directed to pay David Lloyd Foreman as damages, a sum equal to the average of four (4) weeks wages and in which the Union is further directed to put into effect a procedure for the notification and investigation of terminations of employment.

Dated: New York, N.Y.
October 8, 1975

Yours, etc.

DORAN, COLLERAN, O'HARA,
POLLIO & DUNNE, P.C.
Attorneys for Metal Lathers
1140 Avenue of the Americas
New York, New York 10036

By Walter M. Colleran
Walter M. Colleran

TO: GEORGE MOSKOWITZ, ESQ.
340 Madison Avenue
New York, N.Y. 10022

JERRY L. SIEGEL, ESQ.
Assistant U.S. Attorney
One St. Andrews Plaza
New York, N.Y. 10007

GERALD DUNBAR, ESQ.
Employment Law Clinical Program
49-51 Chambers Street, Suite 220
New York, N.Y. 10007

-----x
UNITED STATES OF AMERICA, : 68 Civ. 2116
Plaintiff, :
-against- :
WOOD, WIRE AND METAL LATHERS INTER- : AFFIDAVIT
NATIONAL UNION, LOCAL NO. 46, :
Defendant. :
-----x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

WALTER M. COLLERAN, being duly sworn, deposes and says:

1. I am the attorney for Wood, Wire and Metal Lathers International Union Local No. 46, defendant herein, and I am familiar with the facts of this action.

2. This affidavit is submitted in support of defendant's application for reconsideration of the Decision By Administrator issued September 25, 1975.

3. The defendant union requests reconsideration because the determination that the union pay David Foreman four weeks' pay is unreasonable, unfair and unjust and because the procedure prescribed for notification and investigation of termination is likewise unfair and unworkable and in derogation of the Court Memorandum confirming rules and procedures dated July 16, 1971, as will be shown more fully hereafter.

4. The Administrator in his decision dated September 25, 1975 had before him the questions as to whether or not the grievant, David Foreman's termination "was without just cause

in violation of the consent decree in these proceedings" and whether "the union's conduct subsequent to the termination served to ratify the improper layoff."

5. The Administrator, obviously recognizing the difficulty of holding the employer liable for an improper layoff because the employer is not a party to the consent decree nor to the litigation from which it arose, has made no finding that the layoff was, in fact, improper but has shifted the entire burden to the union and has assessed damages against it for its alleged failure to make an "aggressive" investigation into the cause for termination. Clearly the union could not be found guilty of ratifying an improper layoff if there is no judgment that the layoff was improper. Moreover, the Administrator himself points out that it has been the historical practice in this industry for the employer to discharge employees for not working productively. This has always been considered "cause" for termination and Rule 7 reserves the right to the employer to discharge for cause. Rule 7 was not intended to interfere with the employer's right in this respect but was intended to regulate the manner of layoffs when work was diminishing on the job site and a reduction in force was to occur.

In the light of these circumstances it is not fair nor reasonable on the part of the Administrator to set up new standards for the union to follow in order to fulfill its duty to the men and at the same time penalize the union for not having followed such standards in the case at bar. Rule 7 sets forth no standards or guidelines for the union to follow in these cases.

In Vaca v. Sines, 385 U.S. 895; 64 LRM 2369, and the whole line of cases thereafter which have considered the union's

duty of fair representation the grievant can only recover from the union if he can show arbitrary or bad faith conduct by the union in processing his grievance. In the instant case there is no grievance procedure or arbitration remedy under the contract but only a complaint procedure under Rule 7, which, incidentally, Foreman did not follow. McGovern did make inquiry both by telephone call and by a personal visit to the job and was apparently satisfied that in line with past practices there was cause for the discharge just as there was for the two white employees who had been discharged for not performing their work satisfactorily.

The Administrator would now seem to be establishing new standards for the union by ignoring this long historical background and practice and, in effect, saying to the union you should establish work standards for specific assignments and because you did not do that you are being held liable for Foreman's layoff. It is impossible to apply standards retroactively and to hold the union responsible and assess damages against it is manifestly unjust.

6. As to the Directive with respect to "notification and investigation" of terminations the Administrator would have the union unilaterally institute a system which would require each employer to notify the union in writing whenever an employee is laid off (1) because his work is unsatisfactory, or (2) not in accordance with Rule 7. The union has no way of requiring an employer to do anything other than what he has agreed to do in the collective bargaining agreement which, incidentally, has just been negotiated for a three year period terminating June 30 1978. Thus, the Administrator is directing the union to do something which it is incapable of doing.

7. In addition the Rules and Procedures for Operation of the Hiring Hall in Rule VIII thereof defines the Administrator's authority to amend, modify, revise or change the rules and procedures "After consultation with the union and the Government." No such consultation has been had with the union nor has it had an opportunity to be heard in respect thereto prior to the issuance of the Decision of September 25, 1975.

8. Accordingly, in the light of the points raised herein the union requests the Administrator to reconsider his Decision of September 25, 1975 and upon reconsideration withdraw the assessment of damages against the union and withdraw the Directive as to notice and investigation of terminations pending a consultation with the union and Government pursuant to Rule 8.

Walter M. Collieran

Sworn to before me this
7 day of October, 1975.

ADA E. TORRES
Notary Public, State of New York
No. 41,002838
Qualified in Queens County
Commission Expires March 30, 1977